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New Federalism and Constitutional Criminal Procedure: Are We Repeating the Mistakes of the Past?

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NEW FEDERALISM AND CONSTITUTIONAL CRIMINAL PROCEDURE: ARE WE REPEATING THE MISTAKES OF THE PAST?

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> *"[T]he very essence of a healthy federalism depends upon the avoidance of needless conflict between state and federal courts. . . ." Federal–state cooperation in the solution of crime under constitutional standards will be promoted, if only by recognition of their now mutual obligation to respect the same fundamental criteria in their approaches.*[1]

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1. Mapp v. Ohio, 367 U.S. 643, 657-58 (1961) (quoting Elkins v. United States, 364 U.S. 206, 221 (1960)).

INTRODUCTION

More than thirty years have passed since the United States Supreme Court made these observations in the landmark case of *Mapp v. Ohio*.[2] The Court, no doubt, thought it was putting an end to the wrenching problems that developed since it laid the groundwork for the exclusionary rule in *Boyd v. United States* in 1886.[3] Although the merits of the exclusionary rule have been debated for many years and will be debated for years to come, the advent of the exclusionary rule raised important issues of federalism that were not resolved easily.

An examination of the cases decided prior to 1961 and the scholarly comment of that time reveals that, after a substantial period of conflict between state and federal constitutional jurisprudence, it became very apparent that there was a need for both state and federal courts to respect "the same fundamental criteria in their approaches."[4]

The *Mapp* decision harmonized federal and state constitutional principles and effectively eliminated these problems. In recent years, however, a "New Federalism"[5] has emerged that has once again led to inconsistencies and conflicts between state and federal constitutional law in the area of criminal procedure. This New Federalism is the expression of state courts' increasing tendency to interpret their constitutions to provide individuals with greater rights than those guaranteed by the United States Constitution. Difficult issues such as the silver platter doctrine, thought by the *Mapp* Court to have been permanently eliminated, have returned as a result of this approach. Regardless of the merits of New Federalism,[6] the increasing fragmen-

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2. *Id.*

3. 116 U.S. 616 (1886).

4. *Mapp*, 367 U.S. at 658.

5. *See infra* notes 64-67 and accompanying text.

6. The merits of New Federalism have been ably and extensively debated by others. *See, e.g.*, William J. Brennan, Jr., *State Constitutions and the Protection of the Individual*, 90 HARV. L. REV. 489, 491 (1977) (contending that state courts should expand the protections afforded under the federal Constitution, looking to "[s]tate constitutions . . . [as] a font of individual liberties"); Ronald K.L. Collins, *Reliance on State Constitutions—The Montana Disaster*, 63 TEX. L. REV. 1095, 1137 (1985) (arguing that "[t]extual similarities between state and federal law do not justify the abdication of an obligation duly imposed on state judges to be the final arbiters of state law"); Jill E. Fisch, *Turf Wars: Federal–State Cooperation and the Reverse Silver Platter Doctrine*, 23 CRIM. L. BULL. 509, 531-32 (1987) (calling for federal legislation requiring universal standards when federal and state interpretations of constitutional criminal procedure differ); Peter J. Galie, *The Other Supreme Courts: Judicial Activism Among State Supreme Courts*, 33 SYRACUSE L. REV. 731, 792-93 (1982) (inviting scholars to examine and comment on New Federalism); James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 764-65 (1992) (criticizing state courts for failing to

tation of our federal and state constitutional jurisprudence may prove once again to be unhealthy or even disastrous for our system of federalism.

This Article begins with an examination of the inconsistencies and conflicts that arose between state and federal constitutional principles before the 1961 decision in *Mapp v. Ohio*.[7] Next, it reviews the

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develop an intelligible discourse on state constitutional law); Ken Gormley, *The Pennsylvania Constitution After* Edmunds, 3 WIDENER J. PUB. L. 55, 58 (1993) (favoring the development of New Federalism in Pennsylvania after the state court rejected the United States Supreme Court's good faith exception to the exclusionary rule); Helen Hershkoff, *State Constitutions: A National Perspective*, 3 WIDENER J. PUB. L. 7, 24 (1993) (noting that state courts use the distinctive features of state constitutions to expand protections of civil liberties); Barry Latzer, *The New Judicial Federalism and Criminal Justice: Two Problems and a Response*, 22 RUTGERS L.J. 863, 885-86 (1991) (expressing general approval of New Federalism while advocating reliance on federal constitutional principles in conflict-of-law cases); Earl M. Maltz, *False Prophet—Justice Brennan and the Theory of State Constitutional Law*, 15 HASTINGS CONST. L.Q. 429, 449 (1988) [hereinafter Maltz, *False Prophet*] (criticizing New Federalism for promoting unjustified state court activism and distorting state constitutional analysis); Earl M. Maltz, *The Dark Side of State Court Activism*, 63 TEX. L. REV. 995, 1023 (1985) [hereinafter Maltz, *The Dark Side*] (opposing value-based state court review); Kenneth J. Melilli, *Exclusion of Evidence in Federal Prosecutions on the Basis of State Law*, 22 GA. L. REV. 667, 739 (1988) (opposing use of state constitutional law to determine the admissibility of evidence in federal criminal cases); Mary Jane Morrison, *Choice of Law for Unlawful Searches*, 41 OKLA. L. REV. 579, 632-35 (1988) (calling on state courts to use their constitutions to expand protections); Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707 (1983) (challenging the legal community to develop a more predictable state constitutional jurisprudence); Leonard Sosnov, *Criminal Procedure Rights Under the Pennsylvania Constitution: Examining the Present and Exploring the Future*, 3 WIDENER J. PUB. L. 217 (1993) (favoring the continued development of New Federalism in Pennsylvania); Donald E. Wilkes, Jr., *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421 (1974) (recognizing the importance of state courts in limiting the power of state government); Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353, 402 (1984) (arguing that state court freedom to disagree with the United States Supreme Court is a basic tenet of federalism); Tom Quigley, Comment, *Do Silver Platters Have a Place in State-Federal Relations? Using Illegally Obtained Evidence in Criminal Prosecutions*, 20 ARIZ. ST. L.J. 285, 325 (1988) (arguing for the application of the exclusionary rule of the state where a search occurs rather than the federal rule); *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1357 (1982) [hereinafter *The Interpretation of State Constitutional Rights*] (promoting state constitutional law as serving an interstitial role); Jose L. Fernandez, Note, *The New Jersey Supreme Court's Interpretation and Application of the State Constitution*, 15 RUTGERS L.J. 491, 510-11 (1984) (criticizing the uncertainty of the New Jersey Supreme Court's approach in deciding whether to use federal standards or apply independent state constitutional grounds); Ronald S. Range, Note, *Reverse Silver Platter: Should Evidence That State Officials Obtained in Violation of a State Constitution Be Admissible in a Federal Criminal Trial*, 45 WASH. & LEE L. REV. 1499, 1526 (1988) (arguing that federal courts should apply state exclusionary rules to actions by state officials). Commentators have noted that individual philosophy influences one's view of New Federalism. *See* Latzer, *supra*, at 863-65; *see also* Brennan, *supra*, at 502; Wilkes, *supra*, at 425, 434-35.

7. 367 U.S. 643 (1961).

success of the *Mapp* decision in resolving these conflicts and the reemergence of these issues under New Federalism. The Article then examines the theoretical and practical problems created by these inconsistencies and the dangers that they pose to our constitutional jurisprudence in the area of criminal procedure. Finally, the Article discusses the future of constitutional criminal procedure.

I. CONSTITUTIONAL CRIMINAL PROCEDURE BEFORE *MAPP V. OHIO*

At the turn of the century, federal and state jurisprudence regarding the exclusionary rule was consistent: there was no exclusionary rule and illegally obtained evidence was admissible in both federal and state courts.[8] Although the United States Supreme Court had hinted in 1886 that a federal exclusionary rule might be on the horizon,[9] in 1904 the Court reaffirmed that evidence seized in violation of the Constitution was admissible in federal courts.[10]

All of this changed dramatically with the Court's 1914 decision in *Weeks v. United States*.[11] In *Weeks*, the Court held for the first time that evidence seized by federal officials in violation of the Fourth Amendment was inadmissible in federal courts.[12] Although *Weeks* is remembered primarily as the case that gave birth to the exclusionary rule, the decision contained another equally important rule. The Court specifically held that its newly established exclusionary rule was only a federal exclusionary rule. The rule applied only to evidence seized by federal officials and offered in federal court. It did not apply to items illegally seized by state officials,[13] nor did it apply to evidence seized by a federal official and offered in state court. Evidence illegally seized by a federal official continued to be admissible in state court as long as the state had not established its own exclusionary rule.[14] Although the first exclusionary rule cases decided by the

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8. *See, e.g.*, Commonwealth v. Tibbetts, 32 N.E. 910 (Mass. 1893) (holding that incriminating letters discovered during a search were admissible as evidence although they were unrelated to the purpose of the search warrant).

9. Boyd v. United States, 116 U.S. 616, 630 (1886) (holding that in a forfeiture action the court cannot compel the defendant or claimant to comply with an order for information).

10. Adams v. New York, 192 U.S. 585, 597-98 (1904) (reaffirming that an illegal search would not result in exclusion of evidence).

11. 232 U.S. 383 (1914).

12. *Id.* at 398.

13. *Id.*

14. *Id.*; *see also* Wilson v. Schnettler, 365 U.S. 381, 385-88 (1961) (holding that state courts determine whether evidence seized by federal agents is admissible in their courts).

Supreme Court after *Weeks* dealt with other issues,[15] it soon became apparent that this disparate treatment of federal and state officials in both federal and state courts opened a Pandora's box of problems.

The first Supreme Court case to deal with these problems was *Byars v. United States*.[16] In *Byars*, the Court had to decide whether the *Weeks* exclusionary rule should be applied to evidence seized unlawfully by state officers who were cooperating with federal officials.[17] The Court reiterated that evidence seized illegally by state officials could be used by federal prosecutors against defendants in federal cases.[18] Such evidence, however, would be excluded if federal agents participated in the wrongful search and seizure.[19] This decision raised more questions than it answered, leaving the courts to determine the nature and extent of federal participation required to trigger the application of the federal exclusionary rule. Not surprisingly, subsequent decisions were confusing and, in many cases, contradictory.[20]

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15. *See, e.g.*, Burdeau v. McDowell, 256 U.S. 465, 475 (1921) (holding that the *Weeks* exclusionary rule would not apply to seizures by private individuals); Gouled v. United States, 255 U.S. 298, 306 (1921) (holding that items obtained by stealth, rather than by forcible entry, will be subject to the exclusionary rule); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (establishing what later became known as the "fruit of the poisonous tree doctrine").

16. 273 U.S. 28 (1927).

17. *Id.* at 33.

18. *Id.*

19. *Id.*

20. *See* United States v. Moses, 234 F.2d 124, 126-27 (7th Cir. 1956) (discussing the contradictory nature of these cases); *see also* Lustig v. United States, 338 U.S. 74, 78-79 (1949) (excluding evidence where a federal officer alerted state officials to illegal activities); Gambino v. United States, 275 U.S. 310, 317 (1927) (holding that seizure of liquor by state officers for a federal prosecution would result in exclusion even if no federal officers were present); United States v. White, 228 F.2d 832, 835 (7th Cir. 1956) (holding that evidence obtained illegally by local police officers was admissible in federal court absent complicity by federal officials); Watson v. United States, 224 F.2d 910, 913 (5th Cir. 1955) (holding that the federal exclusionary rule did not apply to a liquor seizure by local police that federal prosecutors sought to introduce in federal court); Williams v. United States, 215 F.2d 695, 696-97 (9th Cir. 1954) (holding that the Fourth Amendment did not apply in a federal criminal trial to state officers' seizure of a gun); Shelton v. United States, 169 F.2d 665, 668 (D.C. Cir. 1948) (finding that the federal exclusionary rule would not apply to state officers' seizure of two forged driver's permits adduced in a federal criminal trial); Lotto v. United States, 157 F.2d 623, 626-27 (8th Cir. 1946) (holding that federal prosecutors can use evidence improperly seized by state officers only on their own account), *cert. denied*, 330 U.S. 811 (1947); United States v. Pugliese, 153 F.2d 497, 499 (2d Cir. 1945) (holding that the exclusionary rule will apply only if state officers are controlled by, or responsible to, the prosecution); Sutherland v. United States, 92 F.2d 305, 308 (4th Cir. 1937) (finding sufficient general cooperation between state and federal officials to find federal action in illegal search by state officers); Fowler v. United States, 62 F.2d 656, 657 (7th Cir. 1932) (holding that existence of an agreement between city police and federal

Two anomalous Supreme Court decisions amply illustrate the problems that arose from the practice of federal officers introducing illegally seized evidence into state courts. In *Rea v. United States*,[21] a federal court initially suppressed items illegally seized by a federal agent.[22] Thereafter, when the agent swore to a complaint against the same defendant in a state case in New Mexico,[23] the United States Supreme Court enjoined the agent from testifying in the state court.[24] Conversely, the Court in *Wilson v. Schnettler*[25] refused to enjoin federal agents from testifying in state proceedings where no prior federal court order existed.[26] The determination of whether a federal officer could testify in state court thus depended solely on whether the matter was litigated first in federal court.[27] Because in most cases federal officials decide whether to initiate a case in federal or state court, a *Rea* injunction effectively could be avoided merely by going directly to state court.

The conundrums created by these differences did not go unnoticed by the commentators of the day.[28] Calls to eliminate disparate

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officers giving federal prosecutors first opportunity to charge defendants under federal law justified finding federal action in illegal state search).

21. 350 U.S. 214 (1956).

22. *Id.* at 215.

23. *Id.*

24. *Id.* at 217.

25. 365 U.S. 381 (1961).

26. *Id.* at 387.

27. *Id.* at 387-88. The *Wilson* Court also noted that lack of probable cause was not alleged; however, this did not appear to be determinative. *Id.* at 388.

28. *See* Francis A. Allen, *The* Wolf *Case: Search and Seizure, Federalism, and the Civil Liberties*, 45 ILL. L. REV. 1, 23 (1950) (noting that the difficulties in showing a tainted search may encourage federal officials to cooperate with state officers as a convenient device to avoid the exclusionary rule); Julius Berman & Paul Oberst, *Admissibility of Evidence Obtained by an Unconstitutional Search and Seizure—Federal Problems*, 55 NW. U. L. REV. 525, 551 (1960) (predicting that rejection of the silver platter doctrine in *Elkins* would motivate resolution of conflicts involving both the reverse silver platter doctrine and the exclusionary rule); Gerald H. Galler, *The Exclusion of Illegal State Evidence in Federal Courts*, 49 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 455, 460 (1959) (calling for uniform application of the exclusionary rule because "illegal actions on the part of state and federal officers are equally repugnant to the federal constitution"); J.A.C. Grant, *The Tarnished Silver Platter: Federalism and Admissibility of Illegally Seized Evidence*, 8 UCLA L. REV. 1, 42-43 (1961) (recommending that a committee analyze the distinctions between unconstitutional and illegal searches and seizures, rather than allowing courts to decide the differences on an ad hoc basis); Yale Kamisar, Wolf *and* Lustig *Ten Years Later: Illegal State Evidence in State and Federal Courts*, 43 MINN. L. REV. 1083, 1194-95 (1959) (noting that abolition of the silver platter doctrine would encourage federal and state officials to work together to protect individual liberties rather than inviting illegality in their cooperation); Alan C. Kohn, *Admissibility in Federal Court of Evidence Illegally Seized by State Officers*, 1959 WASH. U. L.Q. 229, 253 (stating that "[s]erious impairment of federal law enforcement could result if state officers, during investigation of state crimes which overlap federal crimes, commit an illegal search and seizure"); Judson

treatment came as early as 1948.[29] Authors noted that the large overlap in federal and state criminal laws provided opportunities for forum selection and cooperation between federal and state officials in circumventing the federal exclusionary rule.[30] These commentators also recognized that serious problems arose under specific circumstances, such as when state officials testifying in federal court were not bound by the federal exclusionary rule,[31] when federal officials were able to offer illegally seized evidence in state proceedings,[32] and when state officials were permitted to introduce illegally seized evidence in the courts of another state.[33] These problems came to be designated

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A. Parsons, Jr., *State–Federal Crossfire in Search and Seizure and Self Incrimination*, 42 CORNELL L.Q. 346, 349 (1957) (predicting that the availability of state prosecution may lessen federal officers' motivation to obtain valid search warrants, and may even tempt them to act wrongfully); Comment, *Judicial Control of Illegal Search and Seizure*, 58 YALE L.J. 144, 159 (1948) [hereinafter *Judicial Control*] (noting that regardless of the official stance, "[r]outine acceptance and use of tainted evidence secured by another agency encourages illegal search to the same extent as would a prior agreement"); Comment, *The* Benanti *Case: State Wiretap Evidence and the Federal Exclusionary Rule*, 57 COLUM. L. REV. 1159, 1169-70 (1957) [hereinafter *The* Benanti *Case*]; Ivon B. Blum, Case Note, *Search and Seizure: Evidence: Admissibility in Federal Courts of Evidence Unlawfully Seized by State Officers*, 6 UCLA L. REV. 703, 706-07 (1959) (asserting that the Supreme Court's inconsistent approach toward unlawful state seizure of evidence results in due process violations just as reprehensible as the coercion of confessions); Case Note, *Constitutional Law—Admissibility in Federal Prosecution of Evidence Obtained from Illegal Search and Seizure by State Agents*, 46 IOWA L. REV. 469, 470-71 (1961) (criticizing the federal courts' use of the silver platter doctrine); Note, *The* Weeks-Wolf *Dilemma: Illegal State Evidence in Federal Courts*, 46 VA. L. REV. 587, 594 (1960) (noting that a uniform exclusionary rule in the federal courts would obviate the difficulties in delineating between collaboration and true "silver platter" evidence).

29. *See Judicial Control*, *supra* note 28, at 158-60 (opposing the limitation on the use of the exclusionary rule solely for illegal searches made by officials of the prosecuting government).

30. *See* Kamisar, *supra* note 28, at 1187-90 (noting that a system of cooperative federalism had developed in law enforcement that was not recognized by the public or the courts); Kohn, *supra* note 28, at 253-55 (pointing out the overlap between state and federal criminal laws and the temptation for state officials to engage in illegal searches and seizures).

31. Allen, *supra* note 28, at 22-23 (noting that this doctrine can cause federal officials to encourage state officials to seize evidence illegally); Kamisar, *supra* note 28, at 1129-45 (calling for a reexamination of the silver platter doctrine in light of recent Supreme Court decisions); *The* Benanti *Case*, *supra* note 28, at 1170 (arguing that this doctrine allows tacit agreements whereby state officials can accomplish prohibited federal action).

32. Berman & Oberst, *supra* note 28, at 547-49 (considering the approaches of the various states to the admissibility of evidence illegally seized by federal officials); Parsons, *supra* note 28, at 348-49 (reviewing state cases and concluding that federal officials may be tempted to act wrongfully to aid state officers).

33. *See* Berman & Oberst, *supra* note 28, at 529-33, 549-51 (reviewing the development of state exclusionary rules and discussing the problems of presenting evidence illegally obtained in one state in another state); Galler, *supra* note 28, at 459 n.23 (noting disparities among states regarding the admissibility of evidence seized in other states).

as, respectively, the silver platter doctrine,[34] the reverse silver platter doctrine,[35] and the interstate silver platter doctrine.[36] For purposes of this Article, they will all be referred to as the silver platter doctrine. Commentators noted the perils inherent in courts' increasing use of injunctions to prevent law enforcement officers from testifying in the courts of other jurisdictions.[37]

These issues presented seemingly insoluble problems.[38] Matters were further complicated by the fact that individual states were adopting different approaches to the exclusionary rule.[39] It became apparent, to both the courts and the commentators, that these issues had to be resolved and there was only one solution—the harmonization of federal and state jurisprudence governing the exclusionary rule.[40] In 1960 the United States Supreme Court took a step in that direction. Exercising its supervisory powers, the Court held that evidence seized by state officers in violation of the Fourth Amendment was not admissible in federal court.[41] The possibility remained, however, that federal officers could introduce illegally seized evidence in state courts.

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34. Lustig v. United States, 338 U.S. 74, 78-79 (1949); Allen, *supra* note 28, at 22; Kamisar, *supra* note 28, at 1129-30.

35. Berman & Oberst, *supra* note 28, at 547-49.

36. *Id.* at 549-51.

37. *See* Galler, *supra* note 28, at 459 n.23 (discussing problems regarding states' efforts to limit admissibility of illegally seized evidence in other state and federal courts); Parsons, *supra* note 28, at 346, 357-63 (examining the potential difficulties arising out of one court enjoining a law enforcement officer from testifying in another court).

38. *See* Grant, *supra* note 28, at 2-20 (reviewing important cases that gave rise to the exclusionary rule and the problems created by the silver platter doctrine); Kohn, *supra* note 28, at 230-44 (summarizing the development of the exclusionary rule on the federal level).

39. *See, e.g.*, People v. Cahan, 282 P.2d 905, 915 (Cal. 1955) (en banc) (establishing an exclusionary rule based on the California Constitution); Eleuteri v. Richman, 141 A.2d 46, 52 (N.J.) (holding that, except when constitutional rights are plainly flouted, illegally seized evidence will be admitted in New Jersey state courts), *cert. denied*, 358 U.S. 843 (1958); People v. Defore, 150 N.E. 585 (N.Y.) (holding that illegally seized evidence would be admitted in New York state courts), *cert. denied*, 270 U.S. 657 (1926); State v. Hillman, 125 A.2d 94, 96 (R.I. 1956) (holding that a statute excluding illegally seized evidence would be applied prospectively); *see also* Berman & Oberst, *supra* note 28, at 529-33, 549-51 (reviewing the approaches of various states to the exclusionary rule and the problems created by their differing approaches); Galler, *supra* note 28, at 459 n.23 (discussing the difficulties created by disparate state approaches to the exclusionary rule).

40. *See* Elkins v. United States, 364 U.S. 206, 221 (1960) ("The very essence of a healthy federalism depends upon the avoidance of needless conflict between state and federal courts."); *see also* Grant, *supra* note 28, at 42-43 (calling for the appointment of a committee to study the possibility of giving uniformity to the application of the exclusionary rule); *Judicial Control*, *supra* note 28, at 160 (advocating that the exclusionary rule be regarded by courts "as a method of reinforcing a constitutionally guaranteed immunity free of unrelated doctrine").

41. Rios v. United States, 364 U.S. 253, 255 (1960); *Elkins*, 364 U.S. at 223.

Also, the difficulties that resulted from the states' conflicting approaches to the exclusionary rule were still not resolved. Final resolution of these complex problems would have to wait until 1961.[42]

II. THE *MAPP* DECISION

Mapp v. Ohio[43] is known as the case in which Fourth Amendment protections,[44] including the exclusionary rule, were extended to the states through the Due Process Clause of the Fourteenth Amendment.[45] *Mapp* is an important case in several other respects,[46] not the least of which is the reestablishment of harmony between federal and state jurisprudence.[47] Before *Mapp*, federal and state courts were in conflict on the application of the exclusionary rule.[48] The states also disagreed over whether and how the exclusionary rule should be applied.[49] This hodgepodge of conflicting approaches and opinions had serious theoretical and practical implications.

It was difficult to justify a system where federal officers could not use illegally seized evidence in federal court but could walk across the street and use the evidence in state court.[50] Likewise, it was not logi-

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42. For a detailed account of the development of the federal exclusionary rule, see Michael K. Schneider, Comment, *An Exclusionary Rule Colorado Can Call Its Own*, 63 U. COLO. L. REV. 207, 209-19 (1992) (advocating additional applications of New Federalism in Colorado).

43. 367 U.S. 643 (1961).

44. The Fourth Amendment of the Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

45. 367 U.S. at 654-55; *see also* U.S. CONST. amend. XIV, § 1. Section 1 reads in pertinent part, "nor shall any State deprive any person of life, liberty, or property, without due process of law." *Id.* In Wolf v. Colorado, 338 U.S. 25 (1949), the Court applied the Fourth Amendment to the states but did not extend the application of the exclusionary rule.

46. Justice Black provided the fifth vote for the majority but wrote a separate opinion based largely on the Fifth Amendment. *Mapp*, 367 U.S. at 643, 661-66 (Black, J., concurring). The dissent pointed out that certiorari had been granted only to determine the constitutionality of the Ohio obscenity statute, yet the majority decided the case on an issue not presented by the parties. *Id.* at 672-77 (Harlan, J., dissenting); *see also* PHILLIP E. JOHNSON, CASES AND MATERIALS ON CRIMINAL PROCEDURE 47 (2d ed. 1994).

47. *Mapp*, 367 U.S. at 657-58.

48. *See supra* notes 11-39 and accompanying text.

49. *See supra* note 39.

50. This situation persisted until *Mapp v. Ohio*, when the Court noted:

> In non-exclusionary States, federal officers, being human, were by it [the double standard] invited to and did, as our cases indicate, step across the street to the State's attorney with their unconstitutionally seized evidence. Prosecution on the basis of that evidence was then had in a state court in utter disregard of the en-

cal for federal courts to admit evidence seized illegally by state officials, while excluding evidence illegally seized by federal officials.[51] It was also difficult to rationalize situations in which a state would exclude evidence illegally seized by its own officers but admit evidence illegally seized by federal officers or officers of another state.[52] On a

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forceable Fourth Amendment. If the fruits of an unconstitutional search had been inadmissible in both state and federal courts, this inducement to evasion would have been sooner eliminated. There would be no need to reconcile such cases as *Rea* and *Schnettler*, each pointing up the hazardous uncertainties of our heretofore ambivalent approach.

Mapp, 367 U.S. at 658.

51. This contradictory practice was permitted until the Court's decisions in Elkins v. United States, 364 U.S. 206 (1960), and Rios v. United States, 364 U.S. 253 (1960); and was finally laid to rest by Mapp v. Ohio, 367 U.S. 643 (1961). The *Elkins* Court recognized the illogic of this situation:

> If resolution of the issue were to be dictated solely by principles of logic, it is clear what our decision would have to be. For surely no distinction can logically be drawn between evidence obtained in violation of the Fourth Amendment and that obtained in violation of the Fourteenth. The Constitution is flouted equally in either case. To the victim it matters not whether his constitutional right has been invaded by a federal agent or by a state officer.

Elkins, 364 U.S. at 215 (footnote omitted).

52. Several states that adopted the exclusionary rule nevertheless admitted evidence seized illegally by officers of another state. *See* People v. Touhy, 197 N.E. 849, 857 (Ill. 1935) (holding that although evidence unlawfully seized by state officers is not admissible, the rule does not apply to evidence unlawfully obtained by others); Young v. Commonwealth, 313 S.W.2d 580, 581 (Ky. 1958) (allowing evidence illegally seized by Missouri police officers to be admitted in a Kentucky court); People v. Winterheld, 102 N.W.2d 201, 203 (Mich. 1960) (holding that the court-created exclusionary rule is designed to effectuate the guarantees of the state constitution, and such guarantees do not extend to acts beyond its borders); State v. Olsen, 317 P.2d 938, 940 (Or. 1957) (finding that evidence illegally obtained by officers of another state cannot be considered wrongful acts of the state of Oregon); Kaufman v. State, 225 S.W.2d 75, 76 (Tenn. 1949) (concluding that the exclusionary rule is a judicial pronouncement for the preservation of constitutional rights of the citizens of Tennessee). Berman and Oberst noted these problems:

> Of the states which have adopted the exclusionary rule by decision, five have considered the question of its application to evidence illegally obtained by the officers of a sister state and none have excluded it. Tennessee, Illinois, Kentucky, Oregon, and, most recently, Michigan, have admitted the evidence. Oklahoma, which excludes any evidence illegally obtained by an individual, might well exclude evidence obtained by an officer in violation of this sister-state law, especially since the search might also violate the federal constitution under *Wolf*. Some of these states would also accept the reverse Silver Platter Doctrine. But even if a state adopts the exclusionary rule and applies it to evidence procured by federal officials, it might choose to draw the line at that point, accepting evidence procured without violation of any law of the admitting state. Reverse silver platter and interstate silver platter are not quite analogous, either theoretically or practically. Federal officers may indeed be said to be state officers as well and the federal government may not be "foreign" in relation to the states, but this is hardly true of the officers of a sister state with wholly different territorial jurisdiction.

Berman & Oberst, *supra* note 28, at 550 (footnotes omitted); *see also* Galler, *supra* note 28, at 459 n.23.

more practical level, it was troubling that a court in one jurisdiction could enjoin its law enforcement officers from testifying in another jurisdiction where that testimony was welcome.[53]

Mapp brought order out of chaos. It put an end to these irrational results. Reason demanded that the exclusionary rule be applied in a consistent and logical fashion. If illegally seized evidence was tainted and inadmissible, then it must be deemed tainted and inadmissible in all courts, regardless of which government official seized it. The exclusionary rule, if it was to exist, would have to be applied in an absolute and consistent fashion throughout the country. That certainty is what *Mapp* provided. For the first time since 1914, federal and state jurisprudence were consistent.

In its decisions leading up to *Mapp*, as well as the language of the *Mapp* opinion, the Court revealed its interest in reestablishing this harmony. Only twelve years earlier, the Court had rejected an invitation to reach the same conclusion.[54] Between 1949 and 1961, however, it became clear that federal and state courts could not function effectively under discordant and conflicting approaches to the exclusionary rule. The Supreme Court recognized the need for consistency in its 1960 decisions in *Rios v. United States*[55] and *Elkins v. United States*.[56] Perhaps through *Rea v. United States*,[57] and later *Wilson v. Schnettler*,[58] the Court had foreseen the increasing demand for injunctions that would cause a tangled web of insoluble problems involving federal supremacy and state sovereignty.[59] In any event, less than four

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53. The Supreme Court addressed this problem in two decisions. In Rea v. United States, 350 U.S. 214, 217 (1956), the Court upheld a district court injunction precluding a federal agent from testifying about seized evidence in a state court after the district court had determined that the evidence had been unlawfully seized. In Wilson v. Schnettler, 365 U.S. 381, 387-88 (1961), the Court ruled that, absent an allegation that evidence was illegally seized or a federal court order or rule finding that a seizure was unlawful, federal courts could not enjoin federal officers from testifying in state courts. The *Mapp* Court specifically recognized the difficulties created by these situations. *Mapp*, 367 U.S. at 658; *see supra* note 50.

It was also possible that states could attempt to enjoin their officers from testifying in the courts of another state or even in federal courts. *Cf.* Galler, *supra* note 28, at 459 n.23 (noting that a state's attempt to enjoin its officers from testifying in federal court would violate the Supremacy Clause of the federal Constitution).

54. *See* Wolf v. Colorado, 338 U.S. 25, 33 (1949) (holding that the Fourteenth Amendment did not forbid the admission of evidence obtained by an unreasonable search and seizure in a state court prosecution for a state crime).

55. 364 U.S. 253, 255 (1960); *see supra* note 41 and accompanying text.

56. 364 U.S. 206, 221 (1960); *see supra* notes 40-41 and accompanying text.

57. 350 U.S. 214 (1956).

58. 365 U.S. 381 (1961).

59. *See supra* notes 21-27 and accompanying text.

months after the *Wilson* decision, the Court issued its opinion in *Mapp*.[60]

It is clear from the language in *Mapp* that the Justices' desire to return to a logical, consistent approach was a determinant in the Court's decision:

> There is no war between the Constitution and common sense. Presently, a federal prosecutor may make no use of evidence illegally seized, but a State's attorney across the street may, although he supposedly is operating under the enforceable prohibitions of the same Amendment. . . . Moreover, as was said in *Elkins*, "[t]he very essence of a healthy federalism depends upon the avoidance of needless conflict between state and federal courts."[61]

The Justices also specifically noted their desire to eliminate the irrational and unjust effects of disparate constitutional jurisprudence.[62]

In holding that Fourth Amendment protections applied to the states through the Fourteenth Amendment, the Supreme Court reestablished logic and consistency in federal and state exclusionary rule jurisprudence. The *Mapp* decision also eliminated the practical problems that had plagued the criminal justice system since *Weeks*. This period of harmony, however, was only temporary.

III. THE EVOLUTION OF NEW FEDERALISM IN CONSTITUTIONAL CRIMINAL PROCEDURE

For several years following *Mapp*, federal and state criminal procedure jurisprudence continued to develop in a harmonious fashion.[63] The 1970s, however, brought a resurgence of disparate treatment due primarily to the emergence of what has come to be known as New Federalism.[64] New Federalism arose from the principle

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60. The Supreme Court issued its decision in *Wilson* on February 27, 1961, *Wilson*, 365 U.S. at 381, and the *Mapp* decision on June 19, *Mapp*, 367 U.S. at 643. The language of *Mapp* suggests that the Court's decision may have been based, at least in part, on the potential quagmire created by its holdings in *Rea* and *Wilson*. *Mapp*, 367 U.S. at 658. For relevant text of opinion, see *supra* note 50.

61. *Mapp*, 367 U.S. at 657-58 (quoting Elkins v. United States, 364 U.S. 206, 221 (1960)); *see supra* note 40. The Court's desire to return to a logical approach was presaged by the *Elkins* decision the prior year. *Elkins*, 364 U.S. at 215; *see supra* note 51.

62. *Mapp*, 367 U.S. at 658; *see supra* note 50.

63. *See* Latzer, *supra* note 6, at 866; Melilli, *supra* note 6, at 669-70.

64. The advent of New Federalism is commonly ascribed to Justice Brennan's call for such action in a 1977 law review article. Brennan, *supra* note 6, at 503-05; *see, e.g.*, Gardner, *supra* note 6, at 762. Although Justice Brennan's article undoubtedly had a great effect on the development of New Federalism, the concept was discussed and advocated prior to 1977. *See* Wilkes, *supra* note 6 (published in 1974).

that the guarantees of the United States Constitution provide only minimum standards and the states are at liberty to accord their citizens greater rights under their respective state constitutions.[65] For example, states must require that affidavits for search warrants meet the *Gates* "fair probability" test established under the United States Constitution.[66] With regard to state prosecutions, however, state courts are at liberty to interpret their state constitutions to require a stricter standard, such as the two-pronged, *Aguilar-Spinelli* test.[67] In so doing,

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65. As the Supreme Court of New Hampshire stated in *State v. Ball*:

> When State constitutional issues have been raised, this court has a responsibility to make an independent determination of the protections afforded under the New Hampshire Constitution. . . .
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> . . . While the role of the Federal Constitution is to provide the *minimum* level of national protection of fundamental rights, our court has stated that it has the power to interpret the New Hampshire Constitution as more protective of individual rights than the parallel provisions of the United States Constitution.

State v. Ball, 471 A.2d 347, 350 (N.H. 1983) (citations omitted); *see also* State v. Armstead, 262 S.E.2d 233, 234 (Ga. Ct. App. 1979) (holding that the United States Supreme Court's decision that handwriting exemplars may be compelled without violating the Fifth Amendment does not require the same result under Georgia's constitution); State v. Tanaka, 701 P.2d 1274, 1276 (Haw. 1985) (finding as unconstitutional the warrantless search of defendant's garbage because the Hawaii Constitution recognizes an expectation of privacy beyond the parallel provisions in the federal Bill of Rights); State v. Settle, 447 A.2d 1284, 1285 (N.H. 1982) (noting that the "[New Hampshire] constitution often will afford greater protection against the action of the State than does the Federal Constitution"); State v. Alston, 440 A.2d 1311, 1318-19 (N.J. 1981) (finding that "our State Constitution may independently furnish a basis for protecting personal rights when it is not clear that the guarantees of the federal Constitution would serve to grant that same level of protection" (citation omitted)); Commonwealth v. Sell, 470 A.2d 457, 466 (Pa. 1983) (asserting that "[t]his Court has not hesitated to interpret the Pennsylvania Constitution as affording greater protection to defendants than the federal Constitution" (citation omitted)); Gardner, *supra* note 6, at 762 n.4 (distinguishing judicial New Federalism from the legislative program of the Reagan era); Melilli, *supra* note 6, at 670-71 (arguing that the federal Constitution provides a floor and that the states can supplement or expand federal constitutional rights).

66. Illinois v. Gates, 462 U.S. 213, 238 (1983). *Gates* overruled the "two-pronged test" of Aguilar v. Texas, 378 U.S. 108, 114 (1964), and Spinelli v. United States, 393 U.S. 410, 413 (1969), and established a less stringent standard for demonstrating probable cause to obtain a search warrant. *Gates* requires only that, based on the totality of circumstances, the government establish a fair probability that contraband or evidence will be found at a particular location. *Gates*, 462 U.S. at 238.

67. *Aguilar*, 378 U.S. at 114 (holding application for search warrant must inform the magistrate of the underlying circumstances from which the informant concluded the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded the informant was credible or his information reliable); *Spinelli*, 393 U.S. at 415 (holding that the magistrate must ask, "can it fairly be said that the tip, even when certain parts of it have been corroborated by independent sources, is as trustworthy as a tip which would pass *Aguilar*'s tests without independent corroboration?"). Some state courts have opted for the more stringent *Aguilar-Spinelli* test. *See, e.g.*, State v. Jones, 706 P.2d 317, 324 (Alaska 1985) (holding that the broader guarantees against unreasonable searches and seizures afforded under Alaska's constitution would not be pro-

these states apply a standard that holds law enforcement to more stringent guidelines, while giving individuals greater liberties than under the federal test. Although the relative merits of the policies of New Federalism have been and will continue to be hotly debated,[68] it does have the undeniable effect of developing differences between federal and state constitutional jurisprudence[69] as well as differences among the judicial decisions of the various states.[70]

The adoption of New Federalism by individual states can be attributed to many factors. These include the following: a perception by state courts that the United States Supreme Court has in recent years become more conservative and retreated from its more liberal policies of the past,[71] the urging of scholars and judicial officials,[72] a

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tected by the *Gates* test); Commonwealth v. Melendez, 551 N.E.2d 514, 515, 518 (Mass. 1990) (reaffirming the *Aguilar-Spinelli* test as appropriate for determining probable cause under the Massachusetts Declaration of Rights); People v. Griminger, 524 N.E.2d 409, 411 (N.Y. 1988) (holding that "the *Aguilar-Spinelli* two-prong test should be applied in determining whether there is a sufficient factual predicate upon which to issue a search warrant"); State v. Jackson, 688 P.2d 136, 139-41 (Wash. 1984) (en banc) (describing the Supreme Court's *Gates* standard as "nebulous," unpersuasive, and inapplicable in the context of state constitutional analysis).

68. *See supra* note 6.

69. *See infra* notes 77-104 and accompanying text.

70. *See, e.g., infra* notes 82, 87; *see also* Fisch, *supra* note 6, at 519 (noting that states are adopting different constitutional approaches to issues involving electronic surveillance); Melilli, *supra* note 6, at 676-77, 679-80 (noting that states can take different approaches to the same issue); *The Interpretation of State Constitutional Rights, supra* note 6, at 1376 (noting that states may adopt different constitutional standards among themselves that also differ from the federal standard).

71. The importance of this factor was noted in a concurring opinion of the Supreme Court of Oregon:

> Almost a decade ago Professor Donald E. Wilkes, Jr., wrote some prophetic words in his article entitled *Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421 (1974). After commenting that the United States Supreme Court has transformed from a tribunal of unprecedented legal daring to one of modest aims and self-limiting accomplishments, he predicted that "[s]tate courts may be on the verge of gaining new importance, if, in anticipation of the Supreme Court's retrenchment, state constitutions become a more important source of limits on state power." He continued:
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> ". . . In fact, state constitutions may provide the only outlet for judges . . . who disagree with the more deferential approach the Supreme Court may take toward legislation and other state action." *Id.* at 421.
>
> He continued:
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> "The [United States Supreme] Court's shift in attitude has made conditions ripe for an astonishing development in criminal procedure—evasion of the Supreme Court by state courts willing to protect rights of criminal defendants that are no longer guaranteed under the Federal Constitution as interpreted by the [United States Supreme] Court." *Id.* at 425.
>
> This prophecy came to pass recently when the United States Supreme Court decided *Michigan v. Long*, 463 U.S. 1032 (1983).

desire to assert the judicial independence of the state courts,[73] the textual and historical differences among state constitutions,[74] and invitations extended by the United States Supreme Court itself.[75]

State v. Lowry, 667 P.2d 996, 1003-04 (Or. 1983) (en banc) (Jones, J., specially concurring) (quoting Wilkes, *supra* note 6, at 421, 425) (alterations in original) (footnote and citations omitted). *See also* Brennan, *supra* note 6, at 495, 498-501; Fisch, *supra* note 6, at 510; Gardner, *supra* note 6, at 771; *False Prophet*, *supra* note 6, at 432; Melilli, *supra* note 6, at 673-74; Morrison, *supra* note 6, at 595-96; Wilkes, *supra* note 6, at 421, 423, 433-34; Donald E. Ziegler, *Constitutional Rights of the Accused—Developing Dichotomy Between Federal and State Law*, 48 PA. BAR ASS'N Q. 241, 247-49 (1977); *The Interpretation of State Constitutional Rights*, *supra* note 6, at 1331, 1368-69.

72. *See, e.g.*, Brennan, *supra* note 6, at 502; Wilkes, *supra* note 6, at 425, 434-35.

73. In Baker v. City of Fairbanks, 471 P.2d 386 (Alaska 1970), the Supreme Court of Alaska stated:

> While we must enforce the minimum constitutional standards imposed upon us by the United States Supreme Court's interpretation of the Fourteenth Amendment, we are free, and we are under a duty, to develop additional constitutional rights and privileges under our Alaska Constitution if we find such fundamental rights and privileges to be within the intention and spirit of our local constitutional language and to be necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage. We need not stand by idly and passively, waiting for constitutional direction from the highest court in the land. Instead we should be moving concurrently to develop and expound the principles embedded in our constitutional law.

Id. at 401-02 (footnotes omitted); *see also supra* note 65.

74. Brennan, *supra* note 6, at 501; Collins, *supra* note 6, at 1120, 1137-38 (discussing whether textual similarities should control); Galie, *supra* note 6, at 761-72 (discussing the effects of textual and historical differences among the various states); *The Interpretation of State Constitutional Rights*, *supra* note 6, at 1348, 1385-87 (discussing of effects of textual differences). State constitutions can differ dramatically. *See* Gardner, *supra* note 6, at 819 (noting the differences among state constitutions). Whether and under what circumstances state courts should adopt the approach of New Federalism has been a topic of lively debate. *See* Galie, *supra* note 6, at 761-72, 779-85; Maltz, *False Prophet*, *supra* note 6, at 435-43; Maltz, *The Dark Side*, *supra* note 6, at 1002-23.

75. As early as 1940, the United States Supreme Court noted:

> It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions. But it is equally important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action. Intelligent exercise of our appellate powers compels us to ask for the elimination of the obscurities and ambiguities from opinions in such cases. . . . For no other course assures that important federal issues, such as have been argued here, will reach this Court for adjudication; that state courts will not be the final arbiters of important issues under the federal constitution; and that we will not encroach on the constitutional jurisdiction of the states. This is not a mere technical rule nor a rule for our convenience. It touches the division of authority between state courts and this Court and is of equal importance to each. Only by such explicitness can the highest courts of the states and this Court keep within the bounds of their respective jurisdictions.

Minnesota v. National Tea Co., 309 U.S. 551, 557 (1940).

In Lego v. Twomey, 404 U.S. 477 (1972), the Court stated:

> Thus, the prosecution must prove at least by a preponderance of the evidence that the confession was voluntary. Of course, the States are free, pursuant to their

Whatever the reasons, New Federalism is thriving, particularly in the judicial determinations of certain states.[76]

What began slowly has developed into a tidal wave of state court opinions that diverge from the standards established under the federal Constitution. Distinctions have arisen in a variety of situations under the Fourth Amendment. These distinctions include the following: the appropriate standard for probable cause determinations in search warrant situations,[77] recognition of the good faith exception to the exclusionary rule,[78] the requirement of a warrant for automobile

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> own law, to adopt a higher standard. They may indeed differ as to the appropriate resolution of the values they find at stake.

Id. at 489. Similarly, in Michigan v. Long, 463 U.S. 1032 (1985), the Court held: "If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision." *Id.* at 1041. More recently, the Court specifically noted the right of the states to interpret their constitutions more stringently than the federal Constitution: "Individual States may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution." California v. Greenwood, 486 U.S. 35, 43 (1988); *see also* Arizona v. Evans, 115 S. Ct. 1185, 1190 (1995); Cooper v. California, 386 U.S. 58, 62 (1967).

76. Most states have interpreted their state constitutional rights to mirror those guaranteed under the federal Constitution. *See* Gardner, *supra* note 6, at 788-93, 804 (noting that, in many cases, state courts interpret the state constitution to provide the same rights as the federal Constitution); Wilkes, *supra* note 6, at 436 (citing state cases that have not used the adequate state ground rule to avoid Supreme Court review); *The Interpretation of State Constitutional Rights*, *supra* note 6, at 1368, 1388 (citing state cases that interpret state constitutional criminal protections as equivalent to the analogous federal rights). Increasingly more states are adopting the approach of New Federalism. The courts of certain states, such as Alaska, Colorado, Hawaii, Massachusetts, New Jersey, and Pennsylvania, are more disposed than others to reach conclusions under their constitutions that differ from the United States Supreme Court's decisions under the federal Constitution. *See infra* notes 77-104 and accompanying text; *see also* Fisch, *supra* note 6, at 511-17 (noting that New Jersey has been a leader in the adoption of New Federalism); Sosnov, *supra* note 6, at 245-340 (reviewing the differences between federal and Pennsylvania cases); Schneider, *supra* note 42, at 225-29 (discussing Colorado's adoption of New Federalism).

77. *See supra* notes 66-67.

78. *Compare* United States v. Leon, 468 U.S. 897, 922-23 (1984) (recognizing a good faith exception to the exclusionary rule under the federal Constitution) *with* State v. Novembrino, 519 A.2d 820, 856-57 (N.J. 1987) (holding that there is no good faith exception to the exclusionary rule under the New Jersey Constitution) *and* People v. Bigelow, 488 N.E.2d 451, 458 (N.Y. 1985) (holding that there is no good faith exception to the exclusionary rule under the New York Constitution) *and* Commonwealth v. Edmunds, 586 A.2d 887, 901 (Pa. 1991) (holding that there is no good faith exception under the Pennsylvania Constitution). Several states have determined that the good faith exception does not apply because of a statutory exclusionary rule. *See* State v. Garcia, 547 So. 2d 628, 630 (Fla. 1989) (finding that the good faith exception to the exclusionary rule does not apply to the exclusionary provisions of the Florida wiretap law); Gary v. State, 422 S.E.2d 426, 430 (Ga. 1992) (holding that the good faith exception to the exclusionary rule does not apply in Georgia because of a legislatively mandated exclusionary rule); Commonwealth v. Upton, 476 N.E.2d 548, 551 (Mass. 1985) (stating that a state statutory exclusionary rule requires that evidence be excluded absent a showing of probable cause); State v. Carter,

searches,[79] consent searches,[80] the plain view doctrine,[81] standing requirements,[82] inventory searches,[83] consensual monitoring of conversations,[84] the use of dogs to detect narcotics,[85] the standard for

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370 S.E.2d 553, 562 (N.C. 1988) (stating that the job of crafting a good faith exception to North Carolina's exclusionary rule belongs to the legislature, not the judiciary); *see also* Schneider, *supra* note 42, at 231 (discussing jurisdictions that have rejected the good faith exception).

79. *Compare* United States v. Ross, 456 U.S. 798, 809 (1982) (eliminating the warrant requirement for vehicle searches under the federal Constitution) *with* State v. Benoit, 417 A.2d 895, 901 (R.I. 1980) (holding that, absent exigent circumstances, a warrant is required for a vehicle search under the Rhode Island Constitution).

80. *Compare* Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973) (holding that an individual's knowledge of the right to refuse is not required to find consent to search under the federal Constitution) *with* State v. Johnson, 346 A.2d 66, 67-68 (N.J. 1975) (holding that, under the New Jersey Constitution, the government must prove the individual's knowledge of the right to refuse in order to establish valid consent).

81. *Compare* Texas v. Brown, 460 U.S. 730, 739-43 (1983) (holding that, under the federal Constitution, the plain view doctrine permits a warrantless seizure of a suspicious item) *with* State v. Ball, 471 A.2d 347, 353 (N.H. 1983) (holding that, under the New Hampshire Constitution, mere suspicion is not enough to justify the warrantless seizure of an item).

82. *Compare* Rakas v. Illinois, 439 U.S. 128, 133-34, 140-48 (1978) (rejecting the automatic standing rule and holding that in order to establish standing to exclude evidence, under the federal Constitution, the individual must establish a legitimate expectation of privacy in the invaded place) *with* State v. Culotta, 343 So. 2d 977, 981-82 (La. 1976) (holding that, under the Louisiana Constitution, standing is given to third parties who are adversely affected by the improper search) *and* Commonwealth v. Amendola, 550 N.E.2d 121, 125-26 (Mass. 1990) (holding that, under the Massachusetts Constitution, anyone charged with possession of an item automatically has standing to object to its admissibility) *and* State v. Settle, 447 A.2d 1284, 1285-86 (N.H. 1982) (holding that the automatic standing rule applies under the New Hampshire Constitution) *and* State v. Alston, 440 A.2d 1311, 1320 (N.J. 1981) (holding the automatic standing rule applies under the New Jersey Constitution) *and* Commonwealth v. Sell, 470 A.2d 457, 468 (Pa. 1983) (holding that the automatic standing rule applies under the Pennsylvania Constitution) *and* State v. Wood, 536 A.2d 902, 908 (Vt. 1987) (holding that the automatic standing rule applies under the Vermont Constitution) *and* State v. Simpson, 622 P.2d 1199, 1206 (Wash. 1980) (en banc) (holding that the automatic standing rule applies under the Washington Constitution).

83. *Compare* Colorado v. Bertine, 479 U.S. 367, 374-75 (1987) (holding that, under the federal Constitution, inventory searches of impounded vehicles and their contents, including containers, are lawful) *with* State v. Daniel, 589 P.2d 408, 417-18 (Alaska 1979) (holding that "a warrantless inventory search of closed, locked, or sealed luggage, containers, or packages contained within a vehicle is unreasonable and thus an unconstitutional search under the Alaska Constitution") *and* State v. Opperman, 247 N.W.2d 673, 675 (S.D. 1976) (holding that, under the South Dakota Constitution, inventory searches of vehicles are limited to articles within plain view).

84. *Compare* United States v. White, 401 U.S. 745, 752-53 (1971) (holding that, under the federal Constitution, agents may monitor a conversation with the consent of only one of the participants) *with* Commonwealth v. Blood, 507 N.E.2d 1029, 1034 (Mass. 1987) (holding unconstitutional, under the Massachusetts Constitution, a statute that authorized consensual monitoring in a person's home) *and* Commonwealth v. Schaeffer, 536 A.2d 354, 371 (Pa. Super. Ct. 1987) (holding that consensual monitoring of a person's conversations within his home without his consent violates the Pennsylvania Constitution).

determining when the seizure of a person takes place,[86] searches incident to arrest,[87] the use of automobile checkpoints,[88] limitations on the use of beepers,[89] monitoring the movements of an arrested per-

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85. *Compare* United States v. Place, 462 U.S. 696, 707 (1983) (holding that, under the federal Constitution, a "canine sniff" does not constitute a search within the meaning of the Fourth Amendment) *with* People v. Dunn, 564 N.E.2d 1054, 1057-58 (N.Y. 1990) (holding that, under the New York Constitution, a "canine sniff" is a search), *cert. denied*, 501 U.S. 1219 (1991) *and* Commonwealth v. Martin, 626 A.2d 556, 560-61 (Pa. 1993) (holding that, under the Pennsylvania Constitution, a "canine sniff" of a person is a search).

86. *Compare* California v. Hodari D., 499 U.S. 621, 626-27 (1991) (holding that, under the federal Constitution, a seizure occurs only where there is an application of physical force or submission to the assertion of authority) *with* State v. Oquendo, 613 A.2d 1300, 1310 (Conn. 1992) (holding that, under the Connecticut Constitution, a seizure takes place when a reasonable person would not feel free to leave) *and* State v. Quino, 840 P.2d 358, 364 (Haw. 1992) (holding that, under the Hawaii Constitution, a seizure takes place when a reasonable person would not feel free to leave), *cert. denied*, 113 S. Ct. 1849 (1993) *and* State v. Doss, 603 A.2d 102 (N.J. Super. Ct. App. Div. 1992) (holding that, under New Jersey state law, pursuit is a seizure), *cert. denied*, 611 A.2d 655 (N.J. 1992) *and* State v. Holmes, 813 P.2d 28, 34 (Or. 1991) (holding that, under the Oregon Constitution, a person is seized when he or she has an objectively reasonable belief that he or she is not free to leave).

87. *Compare* United States v. Robinson, 414 U.S. 218, 234-35 (1973) (holding that, under the federal Constitution, a search of an individual incident to any custodial arrest is lawful) *with* Zehrung v. State, 569 P.2d 189, 199 (Alaska 1977) (holding that, under the Alaska Constitution, searches incident to custodial arrests are limited to the "degree necessary under the particular circumstances"), *modified on reh'g*, 573 P.2d 858 (Alaska 1978) *and* State v. Kaluna, 520 P.2d 51, 60 (Haw. 1974) (holding that, under the Hawaii Constitution, "a valid custodial arrest does not give rise to a unique right to search; instead, the circumstances surrounding the arrest generate the authority to search without a warrant") *and* People v. Gokey, 457 N.E.2d 723, 724-25 (N.Y. 1983) (holding that, under the New York Constitution, a warrantless search incident to arrest is unreasonable in the absence of exigent circumstances) *and* State v. Hehman, 578 P.2d 527, 529 (Wash. 1978) (en banc) (holding that, under the Washington Constitution, a custodial arrest is not proper for a minor traffic violation and, therefore, the search of such a person is improper). With regard to the search of a vehicle incident to arrest, compare New York v. Belton, 453 U.S. 454, 460-61 (1981) (holding that, under the federal Constitution, an officer may search the passenger compartment, including the glove box and other containers, incident to the custodial arrest of an occupant of an automobile) with State v. Stroud, 720 P.2d 436, 440-41 (Wash. 1986) (en banc) (holding that, under the Washington Constitution, determination of the reasonableness of the search of a vehicle incident to the arrest of an occupant is based on balancing the dangers to the officers and the possible destruction of evidence against the privacy interests of the individual) and State v. Pierce, 642 A.2d 947, 959 (N.J. 1994) (holding that, under the New Jersey Constitution, the rule in *Belton* does not apply to warrantless arrests for motor vehicle offenses).

88. *Compare* Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 448-55 (1990) (holding that, under the federal Constitution, automobile checkpoints to detect drunken drivers are permitted) *with* Sitz v. Department of State Police, 506 N.W.2d 209, 218 (Mich. 1993) (holding that automobile checkpoints to detect drunken drivers violate the Michigan Constitution) *and* State v. Koppel, 499 A.2d 977, 982-83 (N.H. 1985) (holding that automobile checkpoints to detect drunken drivers violate the New Hampshire Constitution).

89. *Compare* United States v. Karo, 468 U.S. 705, 719-21 (1984) (holding that, under the federal Constitution, law enforcement officers need not obtain a warrant to use a beeper in public view) *with* People v. Oates, 698 P.2d 811, 818 (Colo. 1985) (holding that, under the

son,[90] searches of refuse,[91] and limitations on the use of pen registers.[92]

Disparities have developed in Fifth and Sixth Amendment contexts as well, including the use of suppressed confessions for impeachment purposes,[93] the standard for the determination of the voluntariness of confessions,[94] the scope of the right against self-in-

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Colorado Constitution, officers must as a practical matter obtain a warrant prior to the installation of a beeper).

90. *Compare* Washington v. Chrisman, 455 U.S. 1, 7 (1982) (holding that "it is not 'unreasonable' under the Fourth Amendment for a police officer, as a matter of routine, to monitor the movements of an arrested person") *with* State v. Chrisman, 676 P.2d 419, 423-24 (Wash. 1984) (holding that, under the Washington Constitution, an officer may follow an arrested person into a private dwelling only if the officer has specific, articulable facts to justify entry).

91. *Compare* California v. Greenwood, 486 U.S. 35, 39-44 (1988) (holding that warrantless searches of an individual's garbage outside of the curtilage are not prohibited under the federal Constitution) *with* State v. Tanaka, 701 P.2d 1274, 1276-77 (Haw. 1985) (holding that warrantless searches of garbage outside of the curtilage are protected under the Hawaii Constitution) *and* State v. Hempele, 576 A.2d 793, 814 (N.J. 1990) (holding that warrantless searches of garbage left on the curb for collection violate the New Jersey Constitution).

92. *Compare* Smith v. Maryland, 442 U.S. 735, 739-46 (1979) (holding that the installation of a pen register does not constitute a "search" under the federal Constitution) *with* People v. Sporleder, 666 P.2d 135, 140-41 (Colo. 1983) (en banc) (holding that, under the Colorado Constitution, the use of a pen register constitutes a search and seizure) *and* Commonwealth v. Beauford, 475 A.2d 783, 791 (Pa. Super. Ct. 1984) (holding that, under the Pennsylvania Constitution, a person has a constitutionally protected expectation of privacy in the telephone numbers that person calls), *appeal dismissed as improvidently granted*, 496 A.2d 1143 (Pa. 1985) *and* State v. Gunwall, 720 P.2d 808, 816 (Wash. 1986) (en banc) (holding that, under the Washington Constitution, the installation of a pen register constitutes a search). *See also* State v. Hunt, 450 A.2d 952, 955-58 (N.J. 1982) (holding that, under the New Jersey Constitution, an individual has a protectible interest in telephone toll billing records).

93. *Compare* Harris v. New York, 401 U.S. 222, 225-26 (1971) (holding that, under the federal Constitution, voluntary statements obtained in violation of *Miranda* may be used to impeach a defendant on cross-examination) *with* People v. Disbrow, 545 P.2d 272, 280 (Cal. 1976) (en banc) (holding that, under the California Constitution, voluntary statements obtained in violation of *Miranda* may not be used for impeachment purposes) *and* State v. Santiago, 492 P.2d 657, 664-65 (Haw. 1971) (holding that, under the Hawaii Constitution, voluntary statements obtained in violation of *Miranda* may not be used for impeachment purposes).

94. *Compare* Lego v. Twomey, 404 U.S. 477, 489 (1972) (holding that, under the federal Constitution, the government must establish the voluntariness of a confession by a preponderance of the evidence) *with* People v. Jimenez, 580 P.2d 672, 679 (Cal. 1978) (holding that, under the California Constitution, the government must establish the voluntariness of a confession beyond a reasonable doubt) *and* Magley v. State, 335 N.E.2d 811, 817 (Ind. 1975) (reaffirming that, under the Indiana Constitution, the government must establish the voluntariness of a confession beyond a reasonable doubt) *and* State v. Vernon, 385 So. 2d 200, 204 (La. 1980) (holding that, under the Louisiana Constitution, the government must establish the voluntariness of a confession beyond a reasonable doubt) *and* State v. Miller, 388 A.2d 218, 224 (N.J. 1978) (holding that, under the New Jersey Constitution, the government must establish the voluntariness of a confession beyond a reasonable doubt)

crimination,[95] the validity of derivative use immunity,[96] the requirement that the accused be notified of attempted contacts by counsel,[97] renewal of questioning after assertion of *Miranda* rights,[98] double jeopardy,[99] the right to "face-to-face" confrontation,[100] the standard

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and People v. Danziger, 364 N.E.2d 1125, 1126-27 (N.Y. 1977) (reaffirming that, under the Constitution of New York, the government must establish the voluntariness of a confession beyond a reasonable doubt).

95. *Compare* Gilbert v. California, 388 U.S. 263, 266-67 (1967) (holding that the defendant's right against self-incrimination, under the federal Constitution, does not prevent the taking of handwriting exemplars) *with* State v. Armstead, 262 S.E.2d 233, 234 (Ga. Ct. App. 1979) (holding that compelling a defendant to provide handwriting exemplars would violate his right against self-incrimination under the Georgia Constitution).

96. *Compare* Kastigar v. United States, 406 U.S. 441, 462 (1972) (holding that derivative use immunity is valid under the federal Constitution) *with* State v. Gonzalez, 853 P.2d 526, 530 (Alaska 1993) (holding that derivative use immunity is impermissible under the Alaska Constitution) *and* State v. Miyasaki, 614 P.2d 915, 921-23 (Haw. 1980) (holding that derivative use immunity is invalid under the Hawaii Constitution) *and* Attorney Gen. v. Colleton, 444 N.E.2d 915, 918-21 (Mass. 1982) (holding that derivative use immunity offends the Massachusetts Constitution) *and* State v. Soriano, 684 P.2d 1220, 1232 (Or. Ct. App.) (holding that derivative use immunity is invalid under the Oregon Constitution), *aff'd*, 693 P.2d 26 (Or. 1984).

97. *Compare* Moran v. Burbine, 475 U.S. 412, 422-23 (1986) (holding that, under the federal Constitution, a detainee need not be apprised of efforts by counsel to render assistance if the detainee does not request an attorney) *with* State v. Stoddard, 537 A.2d 446, 452 (Conn. 1988) (holding that, under the Connecticut Constitution, a detainee must be informed of efforts by counsel to render assistance) *and* Haliburton v. State, 514 So. 2d 1088, 1090 (Fla. 1987) (holding that police refusal to grant counsel access to a detainee violated the Florida Constitution), *cert. denied*, 501 U.S. 1259 (1991) *and* People v. Pinzon, 377 N.E.2d 721, 725 (N.Y. 1978) (holding that, under the New York Constitution, police have the burden of ensuring that counsel can communicate with a detainee) *and* State v. Haynes, 602 P.2d 272, 277 (Or. 1979) (en banc) (holding that, under the Oregon Constitution, if counsel attempts to contact a detainee and the police do not inform the detainee, no statements thereafter given by the detainee are admissible), *cert. denied*, 446 U.S. 945 (1980) *and* Commonwealth v. Hilliard, 370 A.2d 322, 324 (Pa. 1977) (holding that, under the Pennsylvania Constitution, if counsel has expressed a desire to be present during interrogation, a waiver of counsel obtained in counsel's absence is invalid).

98. *Compare* Michigan v. Mosley, 423 U.S. 96, 99-107 (1975) (holding that, under the federal Constitution, a suspect who has asserted the right to remain silent may be reinterviewed at a later time) *with* People v. Pettingill, 578 P.2d 108, 117 (Cal. 1978) (en banc) (holding that, under the California Constitution, a suspect may not be reinterviewed after asserting his right to remain silent).

99. *Compare* Bartkus v. Illinois, 359 U.S. 121, 127-39 (1959) (holding that, under the federal Constitution, successive state and federal prosecutions do not violate the Double Jeopardy Clause) *with* People v. Cooper, 247 N.W.2d 866, 870 (Mich. 1976) (holding that, under the Michigan Constitution, a second prosecution will be permitted only if the interests of the State of Michigan and the jurisdiction that initially prosecuted are substantially different) *and* State v. Hogg, 385 A.2d 844, 847 (N.H. 1978) (holding that successive prosecutions in federal and state court are barred under the New Hampshire Constitution) *and* Commonwealth v. Mills, 286 A.2d 638, 642 (Pa. 1971) (holding that a second prosecution and imposition of punishment for the same offense violates the Pennsylvania Constitution unless the interests of Pennsylvania and the jurisdiction that initially prosecuted are substantially different).

for the application of the right to trial by jury,[101] the requirement that counsel be present at a lineup held before the accused is formally charged,[102] and the general standard for the attachment of the right to counsel.[103] Although this is not intended to constitute a comprehensive list of all of the differences that have developed or all of the states that have reached these conclusions, it provides some indication of the magnitude of these changes.[104]

Because each state is free to make an independent determination on each of these issues, plus a wide variety of other issues,[105] an almost limitless number of divergent governing principles can develop and, in fact, are developing in the area of criminal procedure. Many of the effects of this splintering of the jurisprudence remain unrealized, but much can be learned by reflecting upon the period before *Mapp* returned uniformity to the jurisprudence of criminal procedure.

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100. *Compare* Maryland v. Craig, 497 U.S. 836, 844-50 (1990) (holding that the federal Constitution does not require "face-to-face" confrontation) *with* People v. Fitzpatrick, 633 N.E.2d 685, 688-89 (Ill. 1994) (holding that the Illinois Constitution requires "face-to-face" confrontation) *and* Commonwealth v. Ludwig, 594 A.2d 281, 282-85 (Pa. 1991) (holding that "face-to-face" confrontation is required under the Pennsylvania Constitution).

101. *Compare* Baldwin v. New York, 399 U.S. 66, 68-74 (1970) (holding that, under the federal Constitution, a defendant has a right to jury trial only where imprisonment of more than six months is authorized) *with* Baker v. City of Fairbanks, 471 P.2d 386, 401 (Alaska 1970) (holding that, under the Alaska Constitution, a defendant is entitled to a jury trial in any criminal prosecution for violation of state law or city ordinance).

102. *Compare* Kirby v. Illinois, 406 U.S. 682, 687-91 (1972) (holding that, under the federal Constitution, an accused does not have a right to counsel at a lineup held before being formally charged) *with* Blue v. State, 558 P.2d 636, 643 (Alaska 1977) (holding that, under the Alaska Constitution, absent exigent circumstances, counsel should be provided for lineups held before the accused is formally charged) *and* People v. Bustamante, 634 P.2d 927, 935-36 (Cal. 1981) (en banc) (holding that an accused has a right to counsel at a preindictment lineup under the California Constitution).

103. *Compare* Scott v. Illinois, 440 U.S. 367, 368-74 (1979) (holding that, under the federal Constitution, the right to counsel attaches only in cases in which the defendant is actually sentenced to a term of imprisonment) *with* Alexander v. City of Anchorage, 490 P.2d 910, 915 (Alaska 1971) (holding that, under the Alaska Constitution, a defendant is entitled to the assistance of counsel "for any offense a direct penalty for which may be incarceration . . . loss of a valuable license, or which may result in heavy enough fine to indicate criminality").

104. For other extensive reviews of the cases in which states have departed from federal constitutional interpretations, see Melilli, *supra* note 6, at 675-85, and *The Interpretation of State Constitutional Rights*, *supra* note 6, at 1370-84. *See also* Sosnov, *supra* note 6, at 237-340 (reviewing the cases in which Pennsylvania courts have departed from the federal interpretation of constitutional rights).

105. *See, e.g.*, *supra* note 70.

IV. THE EFFECTS OF NEW FEDERALISM ON THE LAW OF CRIMINAL PROCEDURE

The arrival of New Federalism has provoked a great deal of comment, much of it directed to philosophical issues.[106] To some extent, commentators' positions may be affected by whether they favor a liberal or conservative approach to constitutional criminal procedure. Many who favor a more liberal approach may, as a matter of policy, prefer that the states be left to freely expand individual rights under the state constitutions, while many of a more conservative view may advocate consistency between state and federal constitutional doctrine.[107] Determination of the relative merits of these philosophical positions will be left to others.

Certain undeniable effects of New Federalism, however, may influence a decision on its merits. Many of these same situations existed during the time period between the Court's decisions in *Weeks* and *Mapp* and inspired critical comment by scholars of the day.[108] This section discusses these effects and examines relevant observations of both courts and commentators during the period before *Mapp*. Perhaps through this inquiry the lessons learned prior to *Mapp* can be of benefit and the mistakes of the past can be avoided.

A. The Fragmentation of Criminal Procedure Jurisprudence

New Federalism has led to the fragmentation of constitutional criminal procedure jurisprudence.[109] On a multitude of issues, the federal courts and the courts of each of the fifty states are reaching different conclusions based on different constitutions. The magnitude of these changes can be appreciated only when one further considers that each state is at liberty to reach its own conclusion on each issue, that the nature and basis of each of those decisions can vary among each state, and that those conclusions can then differ from the federal approach. This leads to an almost limitless number of variations and permutations. In a few short years the unified national system of constitutional criminal procedure has been transformed into a perplexing melange of disparate constitutional principles.

In many ways, the present situation is similar to that which existed immediately prior to *Mapp*. At that time as well, federal constitutional

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106. *See supra* note 6.

107. *See, e.g.*, Latzer, *supra* note 6, at 863-65 (discussing the competing viewpoints of various critics of New Federalism).

108. *See supra* notes 28, 31-36.

109. *See supra* notes 77-105 and accompanying text.

principles differed from those of the states, and the states differed among themselves.[110] Scholars of the time noted that it would be salutary for the term "legality," in the constitutional sense, to have the same meaning throughout the country.[111] Logic and perplexing problems, including the silver platter doctrine and injunctions issued against law enforcement officers, ultimately led the Court to conclude that "healthy federalism" required a unified jurisprudence in the area of constitutional criminal procedure.[112]

On an intuitive and theoretical level, maintaining consistency in court decisions on constitutional issues is appealing.[113] Where the language employed in the federal and state constitutions is the same, it might be expected that the same words would have the same meaning.[114] As noted by the pre-*Mapp* scholars, even when specific terms differ, all citizens should be governed by the same constitutional principles.[115] The result is troublesome when an accused in state court is freed as a result of the suppression of evidence, while across the street in federal court another defendant is convicted and sentenced on the same facts.[116] It is equally disturbing that the issue of whether a criminal defendant will receive double jeopardy protection depends upon the prosecutors' choice of the forum.[117]

This fragmentation has led to an arcane labyrinth of constitutional principles that are not easily understood by law enforcement

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110. *See supra* notes 11-42 and accompanying text.

111. Kamisar, *supra* note 28, at 1163 n.268 (citing Galler, *supra* note 28, at 458).

112. *See supra* notes 40, 61 and accompanying text.

113. The court in State v. Bolt, 689 P.2d 519, 527-28 (Ariz. 1984) stated: "We believe . . . that one of the few things worse than a single exclusionary rule is two different exclusionary rules. . . . It is poor judicial policy for rules governing the suppression of evidence to differ depending upon whether the defendant is arrested by federal or state officers." *See also* Fisch, *supra* note 6, at 516-19 (espousing the need for uniformity); Melilli, *supra* note 6, at 736 (arguing for uniformity). *But see The Interpretation of State Constitutional Rights*, *supra* note 6, at 1395 (stating that "interests of federal–state uniformity . . . are simply one consideration to be balanced against the other considerations that argue for a divergent state rule").

114. Whether the exact same language should be given the same meaning is a matter of intense debate. *Compare* Maltz, *The Dark Side*, *supra* note 6, at 995-96, 1002-05, 1023 (favoring same meaning approach) *with* Collins, *supra* note 6, at 1137 (arguing that textual similarities should not control) *and The Interpretation of State Constitutional Rights*, *supra* note 6, at 1348 (stating that "even when confronted with identical federal and state constitutional language, a state court has a different, more expansive role to play in applying its version of the provision") *and* Brennan, *supra* note 6, at 500-02 (arguing that the history of state court decisions that have declined to follow opinions of the United States Supreme Court is indicative of the understanding that state constitutional provisions were not adopted to mirror the federal Constitution).

115. *See supra* notes 111, 113.

116. *See infra* notes 124-130 and accompanying text.

117. *See infra* notes 194-195 and accompanying text.

agents or members of the bar.[118] It has led to uncertainty on many issues.[119] Even if the United States Supreme Court makes a ruling, the issue will not be settled until it has been decided by the highest court in each of the fifty states.[120] On a more practical level, it has led to severe problems involving silver platters, joint investigations, and choice of laws.[121]

B. Silver Platters

In the years prior to *Mapp*, commentators decried the illogical and patently unjust results of silver platter situations that arose from disparate state and federal constitutional principles.[122] They were appalled that state officers testifying in federal court could introduce evidence barred by the federal exclusionary rule, that federal agents could introduce illegally seized evidence in state court, and that state officials could introduce illegally seized evidence in the courts of another state.[123] Calls were made for the elimination of silver platters by the reunification of constitutional jurisprudence,[124] and the Supreme Court responded. The Justices specifically stated that the elimination

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118. As Judge Ziegler noted:

> Although the foregoing rules [relating to New Federalism] may be obvious, their application has created confusion among counsel and some courts. During oral argument of *Michigan v. Mosley*, . . . before the United States Supreme Court, the following dialogue occurred between counsel for Mosley and one member of the Court:
>
> COURT: Why can't you argue all of this as being contrary to the law and the Constitution of the State of Michigan?
>
> COUNSEL: I can because we have the same provision in the Michigan Constitution of 1963 as we have in the Fifth Amendment of the Federal Constitution, certainly.
>
> COURT: Well, you argued the whole thing before.
>
> COUNSEL: In the Court of Appeals.
>
> COURT: Yes.
>
> COUNSEL: I really did not touch upon—I predicated my entire argument on the Federal Constitution, I must admit that I did not mention the equivalent provision of the Michigan Constitution of 1963, although I could have. And I may assure this Court that at every opportunity in the future, I will. (LAUGHTER).

Ziegler, *supra* note 71, at 242-43.

119. *See* Fernandez, *supra* note 6, at 510-11 (noting the "arbitrariness and ambiguities" generated by the approach of the New Jersey Supreme Court).

120. *See* Latzer, *supra* note 6, at 865 (stating that "[w]ith the revival of state constitutional law, no one can know whether a law or a procedure is valid in the individual state—even after the highest court in the nation has ruled on the matter—until the state courts have also considered the question").

121. *See infra* notes 126-160 and accompanying text.

122. *See supra* notes 28-40 and accompanying text.

123. *See supra* notes 31-36.

124. *See supra* notes 28-37 and accompanying text.

of these unjust practices was one of the primary reasons for their opinion in *Mapp*.[125]

The rise of New Federalism has brought about the return of the silver platter doctrine. In the innumerable cases involving overlapping federal and state jurisdiction, state officers can avoid more stringent provisions of state constitutions merely by taking the case to federal court.[126] Because a large number of issues receive disparate treatment, these opportunities arise with great frequency, and as one judicial official has noted, state officers are increasingly taking advantage of these occurrences.[127] In most interstate situations, the officers may select the state where charges will be filed, and they are at liberty to choose the jurisdiction that has the most favorable constitutional principles.[128] In joint federal–state investigations, it may be possible to ensure the admissibility of evidence merely by designating only federal agents as evidence collection officers.[129] In a variety of contexts, New Federalism has resurrected the baneful silver platter doctrine and given it new life.[130]

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125. *See supra* notes 50, 61 and accompanying text.

126. Galie, *supra* note 6, at 737-38 (noting the disparate federal and state constitutional provisions in Alaska); Ziegler, *supra* note 71, at 251-52 (noting that in Pennsylvania the local police seize evidence in violation of the state constitution and deliver that evidence to the federal prosecutor for indictment and trial in the federal court). In fact, even after the state has entered a suppression order, the state officer may bring the charges in federal court and obtain a conviction. *See* United States v. Bedford, 519 F.2d 650, 654 (3d Cir. 1975) (holding that evidence suppressed by a Pennsylvania court is admissible in a federal criminal trial), *cert. denied*, 424 U.S. 917 (1976).

127. Ziegler, *supra* note 71, at 251-52.

128. *See* Berman & Oberst, *supra* note 28, at 550 (finding that in 1960 no state that had considered interstate silver platters excluded the evidence).

129. Several state courts have acknowledged that they lack the authority to create stricter standards for federal law enforcement officials, even if those officials are testifying in state court. *See, e.g.*, State v. Mollica, 554 A.2d 1315, 1324-25 (N.J. 1989) (stating that "[t]he essential principle underlying the development of [the] 'silver platter' doctrine is that protections afforded by the constitution of a sovereign entity control the actions only of the agents of that sovereign entity"); State v. Bradley, 719 P.2d 546, 549 (Wash. 1986) (finding that "[n]either state law nor the state constitution can control federal officers' conduct"); Sanders v. State, 469 A.2d 476, 482 (Md. Ct. Spec. App. 1984) (stating that "[w]hile the standards for *state* law enforcement officers may be more restrictive . . . than the federal provisions, such state standards may not supersede federal law"), *cert. denied*, 474 A.2d 1345 (Md. 1984); *see also* Fisch, *supra* note 6, at 530 n.95 (discussing the impracticability of requiring federal officers to comply with state laws). Therefore, in a joint federal–state investigation in which charges are ultimately brought in state court, the federal officer who seizes the evidence would be bound only by federal constitutional principles.

130. Several commentators have attempted to eliminate silver platters in the federal–state context by suggesting that the federal courts follow state constitutional law. *See, e.g.*, Quigley, *supra* note 6, at 315 (stating that "[i]f the state's exclusionary rule is based on protection of individuals, the federal court should exclude all evidence seized in violation of the state constitution"); Range, *supra* note 6, at 1500 (noting that federal courts that

C. *The Effect upon Law Enforcement Cooperation and Joint Investigations*

Pre-*Mapp* commentators noted the problems that differences in constitutional law created for joint investigations that involved agencies of different states and the federal government. These authors documented the existence of cooperative law enforcement efforts[131] and recognized that such joint investigations gave rise to a special need for consistency in the constitutional rules that governed their conduct.[132] The *Mapp* Court provided this much needed consistency, noting: "Federal–state cooperation in the solution of crime under constitutional standards will be promoted, if only by recognition of their now mutual obligation to respect the same fundamental criteria in their approaches."[133]

Joint investigations are much more common today than they were in the years before *Mapp*.[134] Under a variety of arrangements, federal and state investigators work together on a day-to-day basis on matters of common interest.[135] To a great extent, the crime-fighting campaign has been nationalized.[136] It is ironic that, at this time of increased cooperation, New Federalism and its resultant disparities in

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refuse to excuse evidence obtained in violation of a state constitution "frustrate the right of individual states to provide independent constitutional protection to their citizens . . . and encroach upon state sovereignty and principles of federalism"). Other commentators, however, have stated that, due to supremacy and other considerations, forcing federal courts to conform with state law would be ill-advised and probably impossible. Fisch, *supra* note 6, at 509, 520-30 (citing reasons why federal courts cannot apply state law and noting that generally federal courts have refused to do so); Melilli, *supra* note 6, *passim* (noting the reasons why federal courts cannot apply state law); *see also infra* notes 175-176 and accompanying text. Similarly, in the interstate situation, at least one author has suggested that silver platter problems could be eliminated by having the state courts apply federal constitutional principles in all conflict situations. Latzer, *supra* note 6, at 885-86. State courts would be unwilling, however, to displace state constitutional principles with federal law in isolated cases. Adoption of such an approach would raise serious practical problems and constitutional concerns, including issues of equal protection and full faith and credit. *See* Morrison, *supra* note 6, at 597-609, 635-36 (noting these problems and suggesting a method for choosing applicable state law); *see also infra* notes 180-183 and accompanying text. Thus, disparities will remain and, unavoidably, silver platters will continue to be an integral part of New Federalism.

131. Francis A. Allen, *The Supreme Court, Federalism, and State Systems of Criminal Justice*, 8 DEPAUL L. REV. 213, 214-15 (1959); Kamisar, *supra* note 28, at 1185-90.

132. Kamisar, *supra* note 28, at 1191.

133. Mapp v. Ohio, 367 U.S. 643, 658 (1961).

134. In the years prior to *Mapp*, such arrangements were, for the most part, informal in nature and arose periodically on a case-by-case basis. Kamisar, *supra* note 28, at 1187-90.

135. *See* Fisch, *supra* note 6, at 509; Melilli, *supra* note 6, at 734-39; *The Interpretation of State Constitutional Rights*, *supra* note 6, at 1395.

136. Fisch, *supra* note 6, at 509.

state and federal criminal procedure have generated confusion and difficulties that severely inhibit these anti-crime efforts.[137]

A simple example may be helpful to understand the magnitude of the problem. Suppose that federal agents are working on a joint narcotics investigation, with narcotics agents from states *A*, *B*, and *C* involved in activities extending into all three states.[138] Federal courts and states *A* and *B* do not require a warrant or court order for the installation of a pen register, but state *C* does. In fact, it is a felony in state *C* to install a pen register without a court order or warrant.[139] Federal courts and state *A* have adopted the *Gates* standard for probable cause determinations,[140] but states *B* and *C* have retained the more stringent *Aguilar-Spinelli* standard.[141] The federal courts and states *A* and *C* have adopted the *Leon* good faith exception to the exclusionary rule, but state *B* has rejected this exception.[142] Federal courts and state *B* permit the taking of handwriting exemplars without court authorization, but states *A* and *C* require a warrant.[143] Federal courts and state *C* permit consensual monitoring under *White*, but states *A* and *C* require the consent of all parties and make it a felony to electronically monitor conversations without the consent of all parties.[144]

Federal and state agents cannot be expected to master and comply with the conflicting laws of fifty states. Under these circumstances it would be difficult, if not impossible, for the agents to understand and assess the effects of all of the various rules that could apply, much less determine which rule will apply to each investigative activity.[145] Will the court apply the constitutional law of the forum, the law of the jurisdiction from which the seizing officer hails, federal law, the law of the state where the act occurred, or will the decision be made on some other basis? If the officer installs a pen register or engages in consensual monitoring without a warrant, will the evidence be admissible or will a felony prosecution be brought against the officer? In

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137. *Id.* at 509, 530-32 (noting that New Federalism adversely affects federal–state cooperation and proposing remedial federal legislation); *see also* Melilli, *supra* note 6, at 734, 738-39 (observing that officers operating in a number of jurisdictions cannot learn all the different state constitutional principles).

138. This probably occurs with some frequency where there are several contiguous state borders, such as the borders of Pennsylvania, West Virginia, and Ohio.

139. *See supra* note 92.

140. *See supra* note 66 and accompanying text.

141. *See supra* note 67.

142. *See supra* note 78.

143. *See supra* note 95.

144. *See supra* note 84.

145. Fisch, *supra* note 6, at 530 n.95; Melilli, *supra* note 6, at 738-39.

most cases, decisions as to where the case will be filed and what law will apply are not made until long after an agent's activities are completed. As a result, the agents performing an investigation have no way of knowing what principles will ultimately govern their conduct. Therefore, they have no alternative but to speculate as to which law will apply and take their chances.[146] Furthermore, the problems mentioned here are only a few of the multitude of possible issues in which differences could arise.[147] A unitary system of constitutional rules would eliminate the confusion and difficulties that now plague joint interstate investigations.[148]

D. Choice of Law Problems

Obviously, if federal constitutional standards and the constitutional standards of the various states are identical, there will never be choice of law problems.[149] If, on the other hand, federal constitutional law differs from state constitutional law, the forum court will be required to determine which constitutional standard applies.[150] To some extent, this situation existed before the decision in *Mapp*, and the commentators recognized and discussed these difficult issues.[151] The *Mapp* decision, in unifying federal and state constitutional criminal procedure regarding the exclusionary rule, eliminated these problems.[152]

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146. *See* Melilli, *supra* note 6, at 731 (noting that when federal agents obtain a warrant or take other action they do not know whether they will end up in federal or state court).

147. *See supra* notes 77-104 and accompanying text.

148. Agents involved in joint investigations cannot be expected to work under the most stringent rule that may apply. First of all, federal agents cannot be expected or required to adhere to state law because of federal supremacy considerations. Fisch, *supra* note 6, at 509, 520-30 (citing reasons why state laws cannot apply to federal officers); *see also infra* notes 177-179 and accompanying text. Similarly, if state officers followed the laws of another state with regard to citizens of their own state, serious constitutional considerations, including equal protection, arise. *See* Morrison, *supra* note 6, at 597-609, 635-36 (noting these problems and suggesting a method for choosing applicable state law); *see also infra* notes 180-183 and accompanying text. Furthermore, it would be unrealistic and perhaps impossible to expect the participating officers and judicial officials not only to be acquainted with all of the constitutional principles involved, but also to calculate all of the combinations and permutations, and then determine the most stringent rule. In most circumstances the determination of the most stringent rule may be impossible. Finally, the state judges and magistrates who review search warrants, wiretap orders, and other investigative procedures, may refuse to require that the more stringent rules of other states be applied, or that additional judicial process be issued in order to comply with the more stringent standards of another state.

149. *See* Fisch, *supra* note 6, at 519-20.

150. *Id.* at 520-30 (noting that choice of law problems arise when there is a splintering of the jurisprudence such as that caused by New Federalism).

151. *See generally supra* notes 31-33 and accompanying text.

152. *See supra* notes 61-62 and accompanying text.

With the disparities inherent in New Federalism, choice of law issues have reemerged and created complicated and perplexing problems in both federal–state and interstate situations. These issues have given rise to one of the most nettlesome problems of New Federalism. Although these difficult issues have been the subject of extensive debate, they seem almost impossible to resolve.[153]

On the federal level, based on federal supremacy principles and other considerations, it might be expected that federal constitutional precepts would control in all cases. That has, in fact, been the position taken by many scholars and most federal courts.[154] However, for several reasons, including the amelioration of silver platter problems, a few commentators have advocated that federal judges apply state constitutional principles, especially to state officers who are testifying in federal court.[155]

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153. Fisch, *supra* note 6, at 509, 522 n.65, 530 n.95 (asserting that state standards cannot be applied to federal officers); Latzer, *supra* note 6, at 871-84 (noting the difficulty of choice of law problems in interstate situations and suggesting federal law be applied); Melilli, *supra* note 6, *passim* (suggesting that federal courts not apply state law in federal cases); Morrison, *supra* note 6, at 579-87, 597-632 (discussing the difficult nature of interstate choice of law problems and suggesting a displacement analysis/better law approach); Ziegler, *supra* note 71, at 253-54 (suggesting a balancing test to determine whether a federal court should apply federal or state standards); Quigley, *supra* note 6, at 315, 323 (recommending that federal courts apply state standards to state officials testifying in federal court, and that in interstate cases evidence should be excluded if inadmissible under the standards of the state where the investigation took place); Range, *supra* note 6, at 1500-01, 1513-25 (suggesting that federal courts should apply state law to actions of state officers testifying in federal court).

154. *See, e.g.*, United States v. Hall, 543 F.2d 1229 (9th Cir. 1976), *cert. denied*, 429 U.S. 1075 (1977). In *Hall*, the court stated: "In the absence of any federal violation, therefore, we are not required to exclude the challenged material [evidence obtained in compliance with federal law but in violation of state standards]; the bounds of admissibility of evidence for federal courts are not ordinarily subject to determination by the states." *Id.* at 1235; *see also* Melilli, *supra* note 6, at 669, 724, 739 (stating that federal courts should apply only federal standards and observing that generally federal courts have refused to apply state standards); Range, *supra* note 6, at 1500, 1511 (noting that federal courts generally refuse to exclude evidence seized by state officers in violation of state standards if no federal violation exists).

155. Ziegler, *supra* note 71, at 253-54 (proposing that federal courts apply a balancing of interests test to determine whether state standards should be applied); Quigley, *supra* note 6, at 315 (suggesting that federal courts apply a balancing of interests test to determine whether state standards should be applied); Range, *supra* note 6, at 1500-01, 1513-25 (arguing that federal courts should exclude evidence seized by state officers in violation of their state constitution); *see also* United States v. Henderson, 721 F.2d 662, 665 (9th Cir. 1983) (dictum) (suggesting that state standards could be applied), *cert. denied*, 467 U.S. 1218 (1984); United States v. Speaks, 649 F. Supp. 1065, 1070 (E.D. Wash. 1986) (excluding evidence from a federal prosecution in which state officers seized evidence in violation of their state constitution).

The difficulties in the federal context pale in comparison to the complex and seemingly insoluble choice of law problems that arise in state court situations. Because of the disparities between federal and state constitutional standards, choice of law problems will inevitably arise when federal officers or the officers of another state appear in state court. In regard to federal officers' testimony, many state courts have decided that they are without authority to apply state constitutional standards to actions of federal officials.[156] Their conclusions have been based on a number of considerations, including federal supremacy.[157] However, other courts and commentators have reached the opposite conclusion.[158] These issues become more complicated in interstate cases that involve the testimony of officers from other states.[159]

Compelling reasons may exist not to apply the law of the forum, but the failure to do so can also lead to problems. If a state court does

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156. *See, e.g.*, Basham v. Commonwealth, 675 S.W.2d 376, 379 (Ky. 1984) (holding that federal officers conducting an eavesdropping operation pursuant to a valid federal wiretap order are not in violation of Kentucky state law), *cert. denied*, 470 U.S. 1050 (1985); State v. O'Neill, 700 P.2d 711, 720 (Wash. 1985) (en banc) (observing that the Supreme Court of Washington has never suggested that evidence obtained by federal authorities acting in strict accordance with federal standards was illegal).

157. *See, e.g.*, Sanders v. State, 469 A.2d 476, 482 (Md. Ct. Spec. App.) (noting that in resolving conflicts between enactments of Congress and the states, the Supremacy Clause mandates that federal enactments govern), *cert. denied*, 474 A.2d 1345 (Md. 1984); State v. Mollica, 554 A.2d 1315, 1327 (N.J. 1989) (observing that when federal officers act pursuant to federal authority, state courts treat them as officers from another jurisdiction, and state constitutions do not control their actions); State v. Bradley, 719 P.2d 546, 549 (Wash. 1986) (noting that neither state law nor state constitutions can control the conduct of federal officials); *see* Fisch, *supra* note 6, at 509, 522-23, 530 n.95 (suggesting that, due to supremacy and other considerations, state courts lack authority to apply state standards to federal officers, and pointing out that most state courts have so held).

158. *See* People v. Griminger, 524 N.E.2d 409, 412 (N.Y. 1988) (applying state constitutional standards to federal officers testifying in state court since the defendant was tried for crimes defined by state penal law); Quigley, *supra* note 6, at 319-20 (suggesting that evidence seized by federal officers testifying in state court should be subject to state constitutional standards).

159. Fisch, *supra* note 6, at 522-23 (noting the complexity of interstate situations); Latzer, *supra* note 6, at 869-86 (noting the complexity of interstate situations and suggesting that federal law be applied in cases of conflicts); Morrison, *supra* note 6, at 579-87, 609-32, 635-36 (noting the perplexing problems associated with interstate situations and proposing a displacement analysis/better law approach). In addition, interstate situations implicate difficult and important constitutional issues including equal protection, full faith and credit, and privileges and immunities. *See* Morrison, *supra* note 6, at 597-609.

This complexity is evidenced by Latzer's illustration of six types of situations involving variations in the employer of agents, situs of investigations, and breadth of the exclusionary rule. Latzer, *supra* note 6, at 871-77. In an apparent effort to reach a solution, Latzer proposed that the federal standard be applied to all such situations. *Id.* at 885. This, however, presents a number of serious problems. For other alternatives to this problem, see *supra* note 153.

not apply its more stringent state standards to federal officers, similarly situated state defendants will be treated differently, the admissibility of evidence will be determined by the badge of the officer rather than the legality of the act, and silver platter abuses will be encouraged. Similar problems develop in interstate situations where the court may choose to apply the law of another state. These were exactly the injustices noted by pre-*Mapp* authors[160] that led to the Court's decision in *Mapp*. Constitutional criminal procedure has come full circle. The debate as to what law should apply has been joined, and because the United States Supreme Court and the court of each state will have to reach independent conclusions on a wide variety of issues, the controversy will no doubt intensify over time.

E. Increase in Litigation

In a unified system of constitutional criminal procedure each issue usually will be resolved finally by the United States Supreme Court. Under New Federalism, however, every state is at liberty to reach a different conclusion. As a result, an issue will not be finally resolved until all of the highest state courts and the United States Supreme Court have decided the issue. This will require substantially more litigation than was necessary under a unified system. Rather than requiring that a single case be adjudicated in the federal system to resolve an issue, at least fifty additional cases will have to proceed through the courts of the various states.[161] Considering the multitude of potential issues that will need resolution,[162] New Federalism could lead to a dramatic increase in state court litigation.

Increases in litigation will also result from the ability of criminal defense attorneys who practice in state courts to seek relief upon two distinct grounds. They can base their claims on both the federal and state constitutional standards. Even if the issue is clearly resolved against the accused under federal law, a defendant can still seek relief under the state constitution and appeal that determination to the

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160. In 1959 Professor Kamisar wrote:

> For, . . . so long as that doctrine holds sway there is no "uniform" treatment of illegally seized evidence in federal criminal trials. Presently, there is one rule for federally-seized evidence, another for state-seized. Apparently, then, in search and seizure cases the federal courts can take cognizance of distinct types of fact situations other than those which bear on the legality or illegality of the search itself, *e.g.*, the jurisdiction from which the searching police hail.

Kamisar, *supra* note 28, at 1163 n.268 (citation omitted).

161. *See* Latzer, *supra* note 6, at 865 (noting that standards are not finally determined until all 50 states have decided the issues).

162. *See supra* notes 77-105 and accompanying text.

highest state court. Not only do defense attorneys have these arguments available to them, judicial officials and scholars are encouraging them to raise every possible state constitutional issue in every case.[163] Indeed, it has been suggested that their failure to do so may constitute malpractice.[164] As a result, in every state case every potential state constitutional issue most likely will be raised by a suppression motion or some other claim for relief, and in each case the determination on each issue will then be appealed to the highest court of the state. This process will continue until all of the potential issues are decided. Thereafter, as on the federal level, additional state litigation will be required to determine the retroactivity of the decisions, as well as to explain, refine, explicate, and delineate each of the courts' conclusions.

New Federalism will lead to additional litigation in other areas as well. Numerous constitutional and choice of law issues will arise from the disparities among federal and state constitutional standards.[165] New Federalism has already created needless litigation in the United States Supreme Court. A number of cases decided by the Court have been remanded to the highest court in the state, only to have that court reach the opposite conclusion on state constitutional grounds.[166] This practice leads to even more litigation, because it encourages litigants who lose in the United States Supreme Court to

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163. *See* Brennan, *supra* note 6, at 502 (advocating that criminal defense lawyers in state cases raise state constitutional issues); Melilli, *supra* note 6, at 688-89 (noting that state criminal defendants have two bites at the apple and that the defense bar has been encouraged to raise state constitutional arguments); Ziegler, *supra* note 71, at 244, 249 (encouraging criminal defense lawyers in state cases to raise state constitutional issues).

164. "Any defense lawyer who fails to raise an Oregon Constitution violation and relies solely on parallel provisions under the federal constitution, except to exert federal limitations, should be guilty of legal malpractice." State v. Lowry, 667 P.2d 996, 1013 (Or. 1983) (en banc) (Jones, J., concurring specially).

165. *See supra* notes 149-160 and accompanying text; *infra* notes 169-183 and accompanying text.

166. *See, e.g.*, Commonwealth v. Upton, 476 N.E.2d 548, 559 (Mass. 1985) (finding that search of mobile home violated the Massachusetts Constitution after the United States Supreme Court, in Massachusetts v. Upton, 466 U.S. 727, 734 (1984), held that the search did not offend the federal Constitution); Sitz v. Department of State Police, 506 N.W.2d 209, 225 (Mich. 1993) (holding that an automobile checkpoint to detect drunken drivers violates the Michigan Constitution after the United States Supreme Court, in Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 455 (1990), held that such checkpoints did not violate the federal Constitution); State v. Opperman, 247 N.W.2d 673, 674 (S.D. 1976) (finding that an inventory search of a vehicle violated the South Dakota Constitution after the United States Supreme Court had found, in South Dakota v. Opperman, 428 U.S. 364, 376 (1976), that the search did not offend the federal Constitution); State v. Chrisman, 676 P.2d 419, 424 (Wash. 1984) (holding that a police officer's action in following an arrested suspect into a room violated the Washington Constitution after the United States Supreme Court held, in Washington v. Chrisman, 455 U.S. 1, 7 (1982), that such police

seek remand and reconsideration by the state court.[167] New Federalism has even opened the door to relitigating issues in federal court that have already been decided on the state level.[168]

F. Federal Constitutional Implications

In the years before *Mapp*, it was recognized that the differences between federal and state constitutional law could lead to supremacy issues and other federal constitutional problems, and it was noted that federal law would control where conflicts arose.[169] These problems were eliminated by the unifying effect of the *Mapp* decision.[170] The conflicts created by New Federalism have led to a reemergence of federal constitutional problems involving federal supremacy,[171] equal protection,[172] privileges and immunities,[173] and full faith and credit.[174]

1. Federal Level.—New Federalism requires the federal courts to deal with difficult supremacy issues. A few commentators have suggested that silver platter abuses could be curbed or even eliminated if federal courts would apply state constitutional standards in federal

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action did not violate the federal Constitution); *see also The Interpretation of State Constitutional Rights*, *supra* note 6, at 1389-90 (discussing retroactive incorporation).

167. The possibility of appeal to the United States Supreme Court could be averted if, in the first instance, the highest court in the state would clearly decide the case on the basis of state constitutional rights. *See* Michigan v. Long, 463 U.S. 1032, 1041 (1983). However, it would appear that at least some state courts prefer to resolve only the federal issues and address the state constitutional issues on remand after the United States Supreme Court has decided the case. *See* cases cited *supra* note 166.

168. *See* United States v. Bedford, 519 F.2d 650, 654 (3d Cir. 1975) (affirming a federal conviction based on evidence previously suppressed by a state court on the basis of its state constitutional standards), *cert. denied*, 424 U.S. 917 (1976). Similar results are possible in virtually all situations involving disparate treatment, including cases involving electronic surveillance, search warrants, and confessions.

169. Parsons, *supra* note 28, at 363, 370-72.

170. *See supra* notes 47-63 and accompanying text.

171. Article VI of the Constitution provides in pertinent part: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2; *see supra* notes 157-158 and accompanying text.

172. The Fourteenth Amendment of the Constitution provides in pertinent part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1; *see* Morrison, *supra* note 6, at 606-07.

173. Article IV of the Constitution provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2, cl. 1; *see* Morrison, *supra* note 6, at 607-09.

174. Article IV of the Constitution provides in pertinent part: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State . . . ." U.S. CONST. art. IV, § 1, cl. 1; *see* Morrison, *supra* note 6, at 597-606.

cases, especially when state officers are testifying in federal court.[175] Nonetheless, federal courts rather consistently have held that supremacy considerations, under all circumstances, compel them to apply federal constitutional standards.[176] Indeed, their failure to do so could result in different treatment of similarly situated federal defendants, and this in turn could lead to equal protection problems.

2. State Level.—Federal constitutional issues also arise on the state level. New Federalism has spawned a number of federal supremacy problems, particularly when state courts are considering the actions of federal agents. In an effort to eliminate disparate treatment and silver platter injustices, some authorities have sought to hold federal officers to state constitutional standards when they are testifying in state court.[177] Most courts and commentators, however, have held that states are without authority to control the actions of federal officials.[178] This conclusion leads to other problems. The resulting disparate treatment of similarly situated state criminal defendants raises equal protection concerns. These issues become quite complicated when federal and state law enforcement officers exchange information, for example, when state officials use information obtained by federal agents to obtain state search warrants.[179]

In interstate cases, New Federalism gives rise to a number of federal constitutional issues. When an officer of one state attempts to introduce evidence in the court of another state, that court must decide whether it will apply the constitutional standards of the forum,

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175. *See supra* note 155.

176. *See supra* note 154.

177. *See supra* note 158.

178. "Stated simply, state constitutions do not control federal action." State v. Mollica, 554 A.2d 1315, 1327 (N.J. 1989). "Neither state law nor the state constitution can control federal officers' conduct." State v. Bradley, 719 P.2d 546, 549 (Wash. 1986); *see also* Sanders v. State, 469 A.2d 476, 482 (Md. Ct. Spec. App.) (contending that states may not create more stringent standards for federal officers), *cert. denied*, 474 A.2d 1345 (Md. 1984); Basham v. Commonwealth, 675 S.W.2d 376, 379 (Ky. 1984) (holding that, because of supremacy considerations, Kentucky cannot render federal officers' wiretap unlawful if it is lawful under federal law), *cert. denied*, 470 U.S. 1050 (1985); Fisch, *supra* note 6, at 509, 522, 530 n.95 (suggesting that, due to supremacy and other considerations, state courts lack authority to apply state standards to federal officers and noting that most state courts have reached the same conclusion). At least one pre-*Mapp* commentator recognized that in conflicts between state and federal courts, the differences between state and federal constitutional standards could lead to supremacy questions. Parsons, *supra* note 28, at 363.

179. *See, e.g.*, State v. O'Neill, 700 P.2d 711, 720 (Wash. 1985) (en banc) (upholding the validity of a state court order authorizing electronic surveillance by state officers when the issuance of the order was based on information obtained by federal officers using consensual monitoring that would have been unlawful under state law); *see also* Fisch, *supra* note 6, at 528-29 (noting the difficult issues presented by these situations).

the state from which the officer hails, or the state where the evidence was seized. One commentator has even suggested that federal standards should be applied in all interstate situations.[180] These determinations implicate a number of important federal constitutional issues in addition to federal supremacy, including full faith and credit,[181] equal protection,[182] and privileges and immunities.[183] The constitutional protections afforded by these guarantees may lead to further conflicts that are not easily resolved.

G. The Unreasonable Consequences of New Federalism

The pre-*Mapp* experience demonstrates that the absence of uniformity can lead to unfortunate and unreasonable results.[184] The disparities reintroduced into the jurisprudence by New Federalism have, once again, led to a number of consequences that are illogical, unreasonable, and, in some cases, totally unjust.

Silver platters have returned in both the federal–state and interstate contexts. Accompanying the silver platters have been the ineluctable and intolerable consequences that both pre-*Mapp* and modern scholars have criticized.[185] Law enforcement agents can, as in pre-*Mapp* days, evade constitutional strictures merely by taking the case to another forum;[186] different treatment can be accorded to similarly situated defendants in the same courtroom based solely on the identity of the officer who recovered the evidence;[187] and officials can now obtain a federal conviction based on evidence that was previously suppressed by a state court.[188]

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180. Latzer, *supra* note 6, at 885-86.

181. U.S. CONST. art. IV, § 1; *see supra* note 174. This issue concerns whether, in interstate situations, the forum state is compelled by the federal Full Faith and Credit Clause to apply the constitutional law of the situs state. For a full explication of this issue, see Morrison, *supra* note 6, at 597-606.

182. U.S. CONST. amend. XIV; *see supra* note 172. This question involves many of the same constitutional and practical considerations as the full faith and credit issue. Depending on the constitutional standards that are applied in individual cases, similarly situated defendants in the same state court could be treated differently. For a discussion of this issue, see Morrison, *supra* note 6, at 606-07.

183. U.S. CONST. art. IV, § 2, cl. 1; *see supra* note 173. This issue could possibly arise in a situation involving disparate treatment, such as where forum residents are afforded privacy rights that are not provided to nonresidents. For a full discussion of these issues, see Morrison, *supra* note 6, at 607-09.

184. *See supra* notes 8-42, 110-112 and accompanying text.

185. *See supra* notes 124-130 and accompanying text.

186. *See supra* note 126.

187. *See supra* note 129 and accompanying text.

188. *See* United States v. Bedford, 519 F.2d 650, 654 (3d Cir. 1975) (affirming a federal conviction resulting from the admission of evidence that had previously been suppressed by a state court under its state constitution), *cert. denied*, 424 U.S. 917 (1976).

Silver platters are not the only unreasonable consequences of New Federalism. It is illogical to embrace an approach in which the highest courts of each of the fifty states and the United States Supreme Court must reach independent and conflicting decisions on a multitude of issues, rather than to retain a unified system in which the debate on each issue is put to rest by one decision from the Court.[189] It is unreasonable to expect federal agents who are moving around the country and operating in a number of states to master the complex labyrinth of constitutional law that may develop in each state.[190] It is impractical, in interstate or federal situations, to require state justices of the peace who review police conduct to know all the different constitutional principles in contiguous states as well as the federal standards.[191] Scholars have noted that federal law enforcement officers cannot be expected to be prescient regarding the law that will ultimately be applied to their investigative actions.[192] But that is exactly what is demanded of them when, after the fact, they are notified for the first time that their actions will be judged by more stringent state standards.[193]

New Federalism has led to other results that appear patently unjust. For example, under federal double jeopardy principles, a criminal defendant who is acquitted on the state level may be retried and convicted in federal court,[194] but a number of states have now interpreted their constitutions to bar retrial in state court after a federal acquittal.[195] As a result, a defendant first tried in federal court will

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189. *See* Latzer, *supra* note 6, at 865.

190. *See* Fisch, *supra* note 6, at 530 n.95.

191. *See supra* notes 148, 154-160 and accompanying text.

192. Fisch, *supra* note 6, at 530 n.95; Melilli, *supra* note 6, at 731.

193. People v. Griminger, 524 N.E.2d 409 (N.Y. 1988) (holding that state constitutional standards would govern federal officers testifying in state court even if the investigative action was approved by a federal judicial official); *see also* Quigley, *supra* note 6, at 319-20 (suggesting that evidence seized by federal officers testifying in state court should be subject to state constitutional standards). At the time that the investigation takes place, the federal officer has every reason to believe that the case will be brought in federal court. In addition, all investigative actions are, at the time, reviewed by federal judicial officials who apply federal standards. Only after the investigation is completed and the defendant is arrested is the decision made by the prosecutors to bring the charges in state court.

194. Bartkus v. Illinois, 359 U.S. 121, 132-33 (1959) (noting that, under the federal Constitution, successive state and federal prosecutions do not constitute violations of the Double Jeopardy Clause).

195. People v. Cooper, 247 N.W.2d 866, 870 (Mich. 1976) (holding that, under the Michigan Constitution, a second prosecution by another jurisdiction will be permitted only if the interests of the State of Michigan and the jurisdiction that initially prosecuted are substantially different); State v. Hogg, 385 A.2d 844, 847 (N.H. 1978) (holding that successive prosecutions in federal and state court are barred under the New Hampshire Constitution); Commonwealth v. Mills, 286 A.2d 638, 642 (Pa. 1971) (holding that a second

not be subject to retrial in state court, but another defendant who is first tried and acquitted in state court can be retried and convicted on the federal level. Thus, the double jeopardy protections afforded to individual defendants will depend on where they are tried first, a determination that is, in almost all cases, made by the prosecutors. Similarly unforeseen and unreasonable consequences may emerge in the future as the disparities arising from New Federalism increase in number and effect.

V. FEDERAL AND STATE REACTION TO NEW FEDERALISM

In the twenty years since the emergence of New Federalism, there have been significant developments in the area of constitutional criminal procedure. Based on supremacy grounds and other considerations, federal courts have almost unanimously held that under no circumstances will they apply state constitutional standards in federal proceedings.[196] For similar reasons, state courts generally have concluded that they will not apply state standards to federal officers operating within their jurisdiction.[197] In regard to cases based on state constitutional claims, most state courts have remained in lockstep with the development of federal constitutional principles, thus preserving a unified approach to these issues.[198] Courts in a growing number of states, however, are adopting the tenets of New Federalism on a widening variety of issues.[199] Certain states, such as New Jersey, Pennsylvania, Massachusetts, Hawaii, and Alaska, have been particularly active in this area.[200]

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prosecution and imposition of punishment for the same offense violates the Pennsylvania Constitution unless the interests of Pennsylvania and the jurisdiction that initially prosecuted differ substantially).

196. *See supra* notes 154-155 and accompanying text.

197. *See supra* notes 157-158 and accompanying text.

198. *See* Gardner, *supra* note 6, at 788-93, 804 (noting that, in many cases, state courts interpret those state constitutions to provide the same rights as the federal Constitution); *The Interpretation of State Constitutional Rights*, *supra* note 6, at 1368, 1388 (observing that state courts commonly interpret state constitutional criminal protections as the precise equivalents of the corresponding federal rights).

199. *See generally The Interpretation of State Constitutional Rights*, *supra* note 6, at 1368-69 (noting that as the Burger Court limited the reach of several of the broader Warren Court decisions, state courts gradually relied on their own state constitutions to expand the scope of criminal procedural rights).

200. *See supra* note 76. It appears that the Supreme Court will not review a state court decision based on an interpretation of the state constitution if the state court clearly announces that its decision rests on independent state grounds. Michigan v. Long, 463 U.S. 1032, 1038-42 (1983). For a discussion of the inability to appeal state constitutional decisions resting upon adequate, independent state grounds, see Brennan, *supra* note 6, at 501. Galie, *supra* note 6, at 732; Gardner, *supra* note 6, at 775; Wilkes, *supra* note 6, at 430-31;

The expansion of New Federalism has met with some resistance. State courts have voiced opposition to the approach on policy grounds.[201] Even more significant are the legislative and constitutional initiatives limiting the authority of state courts to diverge from federal standards. At least two states have enacted constitutional amendments requiring that their constitutions be interpreted in conformity with the federal Constitution, and other states have taken actions having a similar effect in specific situations.[202] Nonetheless, it appears clear that, at least in the immediate future, the doctrine of New Federalism will continue to expand and flourish.

VI. THE FUTURE OF CONSTITUTIONAL CRIMINAL PROCEDURE

The vicissitudes of constitutional criminal procedure make accurate predictions in this area extremely difficult, if not impossible. The lessons of history, however, may be helpful in attempting to determine where the development of New Federalism may take this jurisprudence in the coming years.

The continued expansion of the New Federalism into new states and into new issues will lead to even more disparities in the law of constitutional criminal procedure. These will include differences between federal and state standards and the standards applied by the various states on a wide variety of issues.[203] Similar differences developed in the almost fifty years between *Weeks* and *Mapp* and eventually led to a number of serious problems including silver platters, choice of law issues, increased litigation, impediments to joint investigations, constitutional questions, and other consequences that were questionable on both a theoretical and practical level.[204] Near the end of this period, courts were even issuing injunctions to prevent officers from

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Ziegler, *supra* note 71, at 242; *The Interpretation of State Constitutional Rights*, *supra* note 6, at 1332, 1369.

201. For example, the Arizona Supreme Court in *State v. Bolt* stated: "We believe . . . that one of the few things worse than a single exclusionary rule is two different exclusionary rules. . . . It is poor judicial policy for rules governing the suppression of evidence to differ depending upon whether the defendant is arrested by federal or state officers." 689 P.2d 519, 527-28 (Ariz. 1984). Commentators have also espoused the need for uniformity. *See* Fisch, *supra* note 6, at 516-19; Melilli, *supra* note 6, at 736.

202. Both Florida and California have enacted such provisions. *See* CAL. CONST. art. I, § 28(d); FLA. CONST. art. I, § 12; *see also* Gardner, *supra* note 6, at 790 n.119 (discussing the California constitutional provision and its effects); Melilli, *supra* note 6, at 687-88 n.102 (reviewing the Florida and California provisions and their effects); Morrison, *supra* note 6, at 633-34 (discussing Florida, California, and a similar action in Pennsylvania, and pointing out that Maryland has repealed a statute providing enhanced protection).

203. *See supra* notes 77-105 and accompanying text.

204. *See supra* notes 16-42, 110-112, 122-124, 131-133, 149-152, 169, 185 and accompanying text.

testifying in the courts of other jurisdictions.[205] After almost fifty years, these problems reached a critical point and the United States Supreme Court concluded that there was only one solution—a return to a unified system of constitutional criminal procedure. The Court did so in *Mapp*.[206]

As a result of New Federalism, constitutional criminal procedure jurisprudence is once again in the process of fragmenting. Certainly, differences exist between this process and events during the years before *Mapp*, but the effects are remarkably similar. Problems with silver platters, choice of law issues, increased litigation, impediments to joint investigations, constitutional questions, and other questionable consequences are again being encountered.[207] The differences between New Federalism and the situation that existed before *Mapp* make the present problems, if anything, even more complex and perplexing than those encountered during that time.[208]

Virtually all of these difficulties arise from the disparities among federal and state constitutional principles. As a result, the ultimate success or failure of New Federalism may depend upon our ability to minimize the effects of this dissimilar treatment or to eliminate it entirely. Because of supremacy concerns and other considerations, elimination of these differences is unlikely.[209] Unfortunately, the prospects for effectively ameliorating the detrimental effects of New Federalism likewise appear dim.[210]

As New Federalism's precepts are adopted by more states with regard to more issues, the problems will only get worse. The use of silver platters, choice of law issues, constitutional problems, difficulties for joint investigations, and related litigation will continue to increase,

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205. *See supra* notes 21-27 and accompanying text.

206. *See supra* notes 1, 4, 43-62 and accompanying text.

207. *See supra* notes 109-195 and accompanying text.

208. By comparison, the pre-*Mapp* era involved more limited issues and fewer complications than those presented by New Federalism. *Weeks* and *Mapp* involved only the Fourth Amendment exclusionary rule, while New Federalism involves an almost unlimited number of constitutional issues that must each be litigated in the courts of every state. In the pre-*Mapp* era, the issues involved absolutes. Federal courts were bound by the exclusionary rule, and the states were at liberty to adopt or reject the rule on the state level. Today, states develop constitutional principles that can differ to varying degrees, not only from the federal standards, but also from the standards of the other states. In the years before *Mapp*, the federal government was subject to the more stringent standards, and this gave rise to few, if any, supremacy issues. Under New Federalism, the states have the more stringent standards, which lead to a number of complex supremacy considerations. *See supra* notes 169-179 and accompanying text.

209. *See supra* notes 169-183 and accompanying text.

210. The problems presented by New Federalism are even more complex than those that developed prior to *Mapp*. *See supra* note 208 and accompanying text.

possibly at an alarming rate. States may take unacceptable measures to give effect to their constitutional principles,[211] and, as in the years before *Mapp*, courts may issue injunctions to prevent officers from testifying in the courts of other jurisdictions.[212]

As these problems develop and worsen, more and more states may follow the lead of Florida and California and adopt state constitutional provisions that require a unified approach to constitutional criminal procedure.[213] Federal courts may, on supremacy grounds, take steps to protect the independence of federal officers,[214] and Congress could take legislative action to achieve the same result.[215] If the problems created by the disparities in constitutional principles again reach a critical level, even more drastic measures may ensue. The United States Supreme Court could possibly abrogate or modify the "adequate state grounds rule"[216] and hold that federal and state constitutional standards must be the same.[217] It is even possible that Con-

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211. States have already taken similar measures to protect state interests in other areas. For example, Missouri has enacted statutes limiting the ability of state officers to turn over forfeitable property to the federal government. *See* MO. ANN. STAT. §§ 513.647, .649, .653 (Vernon Supp. 1995). Such statutes raise serious issues of federal supremacy and present difficult practical problems in joint federal–state investigations.

212. Under New Federalism such injunctions would, for the most part, presumably arise in situations where a state court is enjoining an officer of that state from testifying in federal court or in the court of another state. In regard to injunctions enjoining testimony in federal court, one gets the impression that we are reliving history. In 1957, before the 1961 decision in *Mapp v. Ohio*, one commentator wrote:

> Some of the state courts which have followed *Weeks* may attempt to solve this problem themselves by also following *Rea*. But here a state court would run afoul of the Supremacy Clause of the Constitution. If a state court enjoined a state officer from testifying in a federal court and a federal court ordered him to testify, obviously the federal court would have to win such a tug of war.

Parsons, *supra* note 28, at 363 (footnote omitted). Due to supremacy concerns, however, it is conceivable that a federal court could order a state court to apply federal standards to a federal officer testifying in state court. Similar federal court orders could require state judicial officers issuing federal search warrants pursuant to rule 41(a), FED. R. CRIM. P., to apply federal standards. *Cf. supra* notes 157-158, 177-178, 200 and accompanying text.

213. *See supra* note 202.

214. *See supra* note 212.

215. *See* Fisch, *supra* note 6, at 531-32 (proposing federal legislation to ensure that enforcement efforts of federal officers are not impeded by state constitutional standards).

216. *See supra* notes 75, 200.

217. Wilkes, *supra* note 6, at 448-50. Although at present this appears unlikely, it is a possible course of action if the problems caused by New Federalism reach a critical stage. As Professor Wilkes noted, this could be accomplished by either eliminating the adequate state ground rule entirely, or reinterpreting the rule. In the latter case, the Court could establish its right to review by holding that the rule is not jurisdictional, decide that a federal question is created because similar state and federal provisions must be construed similarly, or relax the rule based on the conclusion that the state court has been motivated by an "illegitimate" desire to evade the Court. *Id.*; *see also The Interpretation of State Constitutional Rights*, *supra* note 6, at 1339 n.42 (noting that federal courts could apply the preemp-

gress could enact federal legislation requiring a unified approach to constitutional criminal procedure.[218] Although it is very unlikely that these actions will be taken,[219] these possibilities do deserve mention.

CONCLUSION

During the period between the United States Supreme Court's decisions in *Weeks* and *Mapp*, differences developed among federal and state constitutional principles. As these differences increased in number and importance, the resulting conflicts created very serious and, in some cases, seemingly insoluble problems for law enforcement officials. As these problems increased in number and severity, scholars and the Court recognized the urgent need to restore consistency to constitutional criminal procedure on the federal and state levels. The Court answered this need in *Mapp*.

The advent of New Federalism has led to a reemergence of conflicts among federal and state constitutional standards. The resulting problems resemble those that developed in the years before *Mapp*, and are, if anything, even greater in number and more difficult to solve. Over time these problems will continue to increase in number and severity.

New Federalism may, as a matter of legal philosophy, be a favorable or unfavorable development. One's views on the issue may be largely dictated by one's personal convictions. It is indisputable, however, that the conflicts created by this approach give rise to netlesome issues and problems, many of which have been confronted before and found to be difficult, if not impossible, to solve. These problems would, quite obviously, be eliminated immediately if consistency were restored between federal and state jurisprudence. However, states have never been required to limit themselves to the federal standard or follow the standards of other states.

It is quite clear that New Federalism and disparate treatment will be with us for the foreseeable future. The states that have embraced New Federalism will certainly not voluntarily return to the federal standard, and federal courts will not, and perhaps cannot, follow the

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tion doctrine to the elaboration of state constitutional law, particularly in those circumstances when federal doctrine is shaped by competing federal rights or a uniform national standard would be especially valuable).

218. *See The Interpretation of State Constitutional Rights*, *supra* note 6, at 1338 (noting that supremacy establishes the same precedence over state constitutional law for federal legislation that it establishes for the federal Constitution); *see also* Morrison, *supra* note 6, at 632-33 (noting the possibility of congressional action to unify federal and state constitutional standards).

219. *See infra* note 221.

standards set by the individual states.[220] Nor is there any likelihood that harmony will be restored by congressional action or rulings of the United States Supreme Court.[221]

As a result, courts will be required to maintain the integrity of New Federalism while making every effort to mitigate the potentially disastrous effects of disparate treatment. It will not be an easy task. The courts can take steps to ameliorate the problems created by New Federalism, but they can do so only if they understand the nature and seriousness of the difficulties created by the existence of differing standards. Judges who are well acquainted with these issues will, in individual cases, be in a position to understand the practical effects of their rulings, provide guidance on how to deal with the problems, and frame their decisions in a manner best calculated to minimize the difficulties created by disparate treatment. It is hoped that this Article will be of some assistance in that regard. The courts must also be aware that we have trod this road before and keep in mind the oft-quoted words of George Santayana: "Those who cannot remember the past are condemned to repeat it."[222]

220. *See supra* note 154 and accompanying text.

221. Although it has been suggested by commentators that these possibilities exist, *see supra* notes 217-218, it is virtually certain that such steps will not be taken. Congress will not, as a political matter, be inclined to intervene, and the Supreme Court's recognition of New Federalism is firmly entrenched in its jurisprudence. *See supra* notes 75, 200. More important, such actions would involve an attack on the basic tenets of federalism and could raise serious Tenth Amendment questions. U.S. CONST. amend. X.

222. GEORGE SANTAYANA, 1 THE LIFE OF REASON 284 (1905).